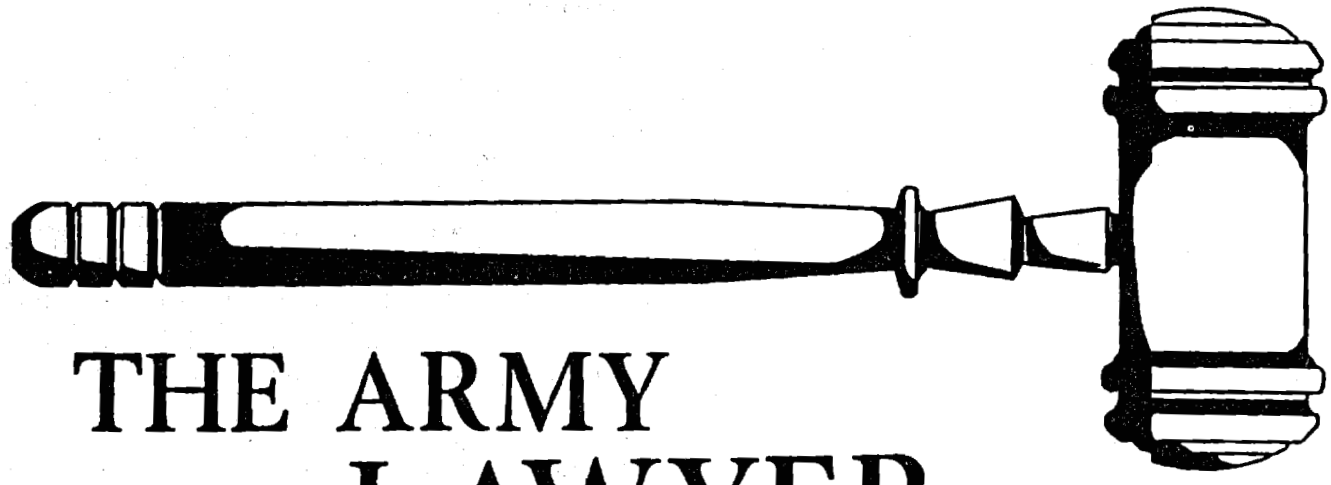

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Dual Compensation and the Moonlighting Military Doctor

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I. Introduction

Military doctors are unique among officers serving in the armed forces in that they may more readily seek off-duty employment in their professional capacity. Officers and civilian employees of the Army Medical Department (AMEDD) who engage in approved off-duty employment face a dilemma when providing care to patients whose bills are paid through federally supported programs such as the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), Medicare, Medicaid, or the Veterans Administration. Generally, military personnel who pursue outside employment are prohibited for accepting compensation that is derived from other federal sources.[1]

Before Congress acted to affect the right of federal officers to receive compensation for extra service, claims for extra compensation were frequently allowed.[2] To avoid potential abuses in this area, Congress enacted laws prohibiting the payment to federal officers of extra compensation for extra services, unless such extra compensation was expressly authorized by law.[3] The Department of the Army (DA) has provided further restrictions on the receipt of extra compensation through its standards of conduct regulation.[4]

The issue is whether the current position precluding AMEDD personnel from accepting additional compensation that is derived from appropriated funds is correct. With that purpose in mind, this article will examine the legislative intent behind the enactments prohibiting dual compensation and the judicial and government positions that have developed in this area.

II. Statutory History of 5 U.S.C. § 5536

The statutory prohibition against dual compensation for federal officers is contained in 5 U.S.C. § 5536. This enactment provides that:

> An employee or member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefore specifically states that it is for the additional pay or allowance.[5]

The language of the statute has been strictly construed, particularly by the Comptroller General. As such, an examination of its legislative history is necessary.

The first dual compensation statute was the Act of May 7, 1822, § 18,[6] provided that no collector, surveyor, or naval officer should ever receive more than $400 annually, exclusive of his regular compensation, for any other service he may render in any other office or capacity. At that time, the amount of payment for extra services was not fixed by law, but was left to the discretion of the Secretary of the Treasury. The act was passed to remove that discretion and to avoid exorbitant payments.[7] The words "any other office" were evidently used to refer to situations where one of these officers might be required to perform the duties of another.[8] The law did not prohibit compensation for extra services having no affinity or connection with the duties of the office held.[9]

During the next fifteen years, a number of suits for extra compensation were brought against the United States by officers not named in the Act of May 7, 1822. Those controversies attracted the attention of Congress to the issue of extra compensation. On February 25, 1839, the House of Representatives was engaged in a heated debate over the General Appropriations Bill for 1839.[10] In an effort to deal with the extra compensation problem, Mr. Williams of North Carolina presented an amendment to the appropriations bill. After some debate, the amendment was changed to provide that "[No] officers of persons whose salaries are fixed by law and regulations, shall receive any extra allowance or compensation whatever for the disbursement of public money, or the performance of any other service".[11] The amendment was later passed as part of the Act of March 3, 1839.[12]

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[1] 5 U.S.C. § 5536 (1982).

[2] *See, e.g.*, United States v. Fillebrown, 32 U.S. 28 (1833); United States v. Ripley, 32 U.S. 18 (1833); United States v. McDaniel, 32 U.S. 1 (1833).

[3] 5 U.S.C. § 5536 (1982).

[4] Dep't of Army, Reg. No. 600–50, Standards of Conduct for Department of the Army Personnel (20 Nov. 1984) [hereinafter cited as AR 600–50].

[5] 5 U.S.C. § 5536 (1982).

[6] 3 Stat. 696 (1822).

[7] Converse v. United States, 62 U.S. 463, 468 (1859).

[8] *Id.* at 469.

[9] *Id.*

[10] Cong. Globe, 25th Cong., 3d Sess. 206 (1839).

[11] *Id.*

[12] 5 Stat. 349 (1839).

The enactment was further changed by the Act of August 23, 1842,[13] which broadened the scope of the law to read in pertinent part: "[T]he performance of any other service or duty. . . ." The language remained unchanged through its incorporation into the United States Code.[14] Finally, in 1966 the law was redesignated within Title 5 of the United States Code as section 5536.[15] With the redesignation came a narrowing of the scope of application from "[a]ny officer in any branch of public service," to the current "[e]mployee or a member of uniformed service."

The principal question to resolve in deciding issues of off-duty compensation is whether the phrase "for any other service or duty" includes all such outside employment. As noted above, the language is derived from the words "any other office," of the Act of May 7, 1822. In reviewing the legislative history of that act, the Supreme Court determined that the words "any other office" applied to situations where an officer was required to perform the duties of another office.[16] For example, the law precluded compensation beyond an officer's fixed salary for extra duties performed for the National Recovery Administration in a temporary duty status[17] and services performed for the Department of State in temporary duty status.[18]

From the foregoing it can be seen that Congress did not intend that the phrase "for any other service or duty" contained in section 5536 be construed to prohibit extra compensation for services which are not connected with one's office. More specifically, it appears as though it was the intent of Congress in enacting these statutes only to preclude extra compensation for those services which are required as part of one's current position. For example, an AMEDD officer who is directed to provide extra services in an emergency at a Veterans Administration hospital would not be eligible to receive extra compensation for those services.

The judicial interpretations in the area of dual compensation must be examined with this legislative intent in mind.

III. Judicial Interpretation

The Supreme Courts approach to analyzing dual compensation issues has generally focused on analysis of the duties being performed. In *United States v. Saunders,*[19] the Court adopted an earlier Attorney General's opinion[20] which interpreted the statutory predecessors to section 5536. The Court held that the Acts of 1839 and 1842 were intended to prevent arbitrary extra allowances in each particular case, but did not apply to distinct employments with salaries affixed to each by law or regulation.[21] Where an officer held two distinct employments, each with its own duties and compensation, he was two officers in the eyes of the law, and in such case was entitled to recover two compensations.[22] If he performed the added duties under a single office for which he received compensation intended to cover all the services he may be called upon to render in such office, then extra compensation was prohibited.[23] In short, the prohibition was against the officer's receiving the salary of an office that was not held, and not against the officer's receiving the salaries of two offices which were legitimately held.

Other cases have echoed this position regarding the receipt of extra compensation for holding two distinct offices. The Court held that an Indian agent who received additional compensation for extra services rendered in the sale of Indian trust lands was entitled to keep the extra compensation.[24] Although the agent was first appointed as a receiver of the land office and later was also appointed as agent for the sale of lands, the Court found that because no new duty had been imposed by the land office, the employments were distinct and the agent could keep the compensation accruing to each.[25]

This same rationale has also been used to deny extra compensation. In a case where a clerk of court sought to recover additional compensation for services rendered in the drawing of juries, the Court found that such services were not rendered in a distinct capacity as jury commissioner, but were incidental and germane to his regular duties as clerk.[26] Although holding against the clerk, the Court repeated the general rule that a person employed to render services in an independent employment, not incidental to his duties, could recover for such services.[27]

In 1909, the Court reviewed a case where a Treasury Department employee rendered off-duty services to the Department of the Interior.[28] The Court denied extra compensation on the ground that the extra services were

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[13] 5 Stat. 510 (1842).

[14] 5 U.S.C. § 70 (1982).

[15] Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 350, 484.

[16] Converse v. United States, 62 U.S. 463, 469 (1859).

[17] Johnston v. United States, 175 F. 2d 612 (4th Cir. 1949)

[18] 38 Comp. Gen. 222 (1958).

[19] 120 U.S. 126 (1887)

[20] 5 Op. Att'y Gen. 765 (1851)

[21] United States v. Saunders, 120 U.S. 126, 129 (1887)

[22] *Id.*

[23] *Id.*

[24] United States v. Brindle, 110 U.S. 688 (1884)

[25] *Id.* at 694

[26] United States v. King, 147 U.S. 676, 681 (1893).

[27] *Id.* at 679.

[28] Woodwell v. United States, 214 U.S. 82 (1909).

performed at the direction of a superior officer and therefore did not amount to a distinct employment.[29]

In summary, the decisions of the Supreme Court have interpreted the acts of Congress as forbidding extra compensation to public officers where the duties were connected with a single office. They were not to be applied to forbid extra compensation to one who holds two distinct offices at the same time, each with its own duties and compensation. If the appointment of the officer was not to a separate and distinct office from the one he or she already held, but was merely an order requiring him or her to perform additional services connected with his or her office, the officer was not entitled to extra compensation, even though the services were performed after hours.[30]

Extra compensation would not be prohibited when applying these rules to a situation where AMEDD personnel are employed in approved off-duty positions which are compensated by appropriated funds. This would appear to hold true as long as the off-duty employment was separate and distinct from the individual's military position and was not engaged in at the direction of the military.

In light of the Supreme Court's position and Congress' apparent intent in enacting the dual compensation laws, the question arises as to why DA adheres to a position which precludes the receipt of extra compensation by service members. To answer this question it is necessary to examine first the position of the Comptroller General then the basis for the DA position.

IV. Comptroller General Position

As a general rule, an officer of the Armed Forces may not accept outside employment that interferes with the performance of his or her military duties.[31] The Department of Defense has established a policy for the off-duty employment of its personnel that provides that such personnel shall not engage in outside employment, with or without compensation, that interferes with, or is not compatible with, the performance of their government duties.[32] The off-duty employment of AMEDD personnel is governed by Army Regulation 40–1, prepared by the Office of the Surgeon General.[33] This regulation states that active duty officers are in a twenty-four-hour, seven-day-a-week duty status and that military duties will at all times take precedence on their time, talents, and attention.[34] AMEDD officers are also required to obtain command approval prior to engaging in remunerative professional civilian employment.[35] Civilian employment must be conducted during non-duty hours, outside the Army Medical Treatment Facility [36] and any off-duty civilian employment generally should not exceed sixteen hours a week.[37]

Army Regulation 40–1 also provides that AMEDD personnel are prohibited by federal law from receiving additional government compensation of any nature, whether received directly or indirectly, for health services rendered to any person.[38] This position is consistent with an evolving pattern of Comptroller General decisions in the area of dual compensation.

The Comptroller General has taken a strict approach to the analysis of off-duty employment by military personnel. While service members may argue that off-duty time is their own—subject to unforeseen emergencies requiring the performance of military duties—the Comptroller General has taken the opposite position. In a 1938 decision,[39] the Comptroller General adopted a test of compatibility between the military service and the off-duty employment. True compatibility would exist where a service member was free to perform both services, without interference of any kind. Applying the test to military personnel, the Comptroller General said, "[T]he time of one in the military service is not his own, however limited the duties of a particular assignment may be, and any agreement or arrangement for the rendition of services to the government in another position or employment is incompatible with his military duties, actual or potential."[40]

By 1966, the Comptroller General's position was refined to the point where all military personnel, both officer and enlisted, were precluded from accepting off-duty government employment.[41] In answering a query from the Secretary of Defense, the Comptroller General stated that officers and enlisted personnel serving on extended active duty in the uniformed services could not be employed during their off-hours in civilian positions which were paid for by appropriated funds.[42] This decision was based upon an

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[29] *Id.* at 90.

[30] 63A AM. JUR. 2d *Public Officers and Employees* § 457 (1984).

[31] *See, e.g.*, 10 U.S.C. § 973(a) (1982) (as added by the Act of Jan. 2, 1968, Pub. L. No. 90–235, 81 Stat. 753, 759 (1967)).

[32] Dep't of Defense, Directive No. 5500.7, Standards of Conduct (Jan. 15, 1977).

[33] Dep't of Army, Reg. No. 40–1, Medical Services—Composition, Mission, and Functions of the Army Medical Department, para. 1–8 (1 July 1983) [hereinafter cited as AR 40–1].

[34] *Id.* at para. 1–8*a*.

[35] *Id.*

[36] *Id.* at para. 1–8*b*(5).

[37] *Id.* at para. 1–8*b*(1).

[38] *Id.* at para. 1–7*b*(2).

[39] 18 Comp. Gen. 213, 216 (1938).

[40] *Id.* at 217.

[41] 46 Comp. Gen. 400 (1966).

[42] *Id.*

earlier holding[43] to the effect that federal law[44] provided a statutory expression of the incompatibility inherent in holding a civil office—state or federal. As this rule has served as the basis for deciding issues of dual compensation for military personnel, an analysis of the supporting federal law is necessary.

The statute[45] in question had its beginnings in an 1870 enactment.[46] That act precluded an officer on the active list from holding a civil office by election or appointment, either state or federal. The acceptance of such an office would result in termination of the military appointment. While the legislative history of the act is meager, a comment by the chairman of the reporting committee shows that a principal concern of the bill's advocates was to ensure civilian control of the government, *i.e.*, to prevent the military from inserting itself into the civil branch of government and, in so doing, growing "paramount" to it.[47] There is also authority for the proposition that Congress intended to prevent military personnel from engaging in other duties which would interfere with their military responsibilities.[48] Finally, it has been suggested that the statutory reference to officers "on the active list" and not to officers on inactive status tends to indicate that the congressional intent was to prevent substantial interference with an officer's duties.[49] It would appear as though the Comptroller General severely strained the apparent intent of Congress by promulgating a rule of complete incompatibility between military service and federal civilian employment.

The original enactment was subsequently codified at 10 U.S.C. § 3544.[50] This statute included the substance of the original act, as well as a subsection prohibiting officers from accepting employment which required separation from their organization or interference with military duties.[51] Once again, in spite of Congress' apparent intent, the Comptroller General continued to view the statute as an expression of the inherent incompatibility of being a military officer and holding a civil position.[52]

In 1968, the statute was amended again,[53] this time redesignating the entire section as 10 U.S.C. § 973 and substituting "officers on active duty" for "regular officers" in the catchline. The most important amendment in terms of dealing with dual compensation for military personnel occurred in 1983.[54] The 1983 amendment completely revised and expanded section 973(b) into a format encompassing four subparagraphs. Of primary importance is Section 973(b)(2) which provides:

> (A) Except as otherwise authorized by law an officer to whom this subsection applies may not hold, or exercise the functions of, a civil office in the Government of the United States—
>
> (i) that is an elective office;
>
> (ii) that requires an appointment by the President by and with the advice and consent of the Senate; or
>
> (iii) that is a position in the Executive Schedule under sections 5312 through 5317 of title 5.
>
> (B) An officer to whom this subsection applies may hold or exercise the functions of a civil office in the Government of the United States that is not described in subparagraph (A) when assigned or detailed to that office or to perform those functions.

Sections 5312 through 5317 of Title 5 specifically detail those positions, in addition to elected and appointed offices, that officers are prohibited from holding. Generally, the prohibited positions are not the type which would be sought by off-duty service members. For example, they range in scope from the Secretary of State,[55] to the Assistant Secretary of Labor for Veterans Employment.[56]

The legislative history of the revision to section 973(b) indicates that the clarification was necessary to permit military personnel assigned to the Judge Advocate General's Corps to continue assisting attorneys in the Department of Justice with cases related to military installations and other military matters.[57] The clarification was not intended to encourage substituting military officers for civilian personnel in areas unrelated to the military.[58] This language is indicative of the continuing intent of Congress to avoid military control over key government positions.

In retrospect, the revision of section 973(b) brings us back full circle to Congress' original intent in passing the

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[43] 20 Comp. Gen. 885, 888 (1941).

[44] *Id.*

[45] 10 U.S.C. § 1973 (1982).

[46] Act of July 15, 1870, ch. 294, § 18, 16 Stat. 319.

[47] *See* Cong. Globe, 41st Cong., 2d Sess. App. 150 (1870).

[48] *See, e.g.*, 35 Op. Att'y Gen. 187, 190 (1927); 15 Op. Att'y Gen. 551, 553 (1876); 13 Op. Att'y Gen. 310, 311 (1870).

[49] Riddle v. Warner, 552 F. 2d 882, 884 n.11 (9th Cir. 1975).

[50] 16 Stat. 319 (1870). For a discussion of the effects of 10 U.S.C. § 3544, *see* Kerig, *Compatability of Military and Other Public Employment*, 1 Mil. L. Rev. 21, 45 (1958).

[51] 10 U.S.C. § 3544(a) (1952).

[52] 20 Comp. Gen. 885, 888 (1941).

[53] Act of Jan. 2, 1968, Pub. L. No. 90-235, § 4(a)(5)(A), 81 Stat. 759.

[54] Defense Authorization Act, Pub. L. No. 98-94, 97 Stat. 655 (1983).

[55] 5 U.S.C. § 5312 (1982).

[56] 5 U.S.C. § 5316 (1982).

[57] Pub. L. No. 98-94, 1983 U.S. Code Cong. & Ad. News (97 Stat.) 1170.

[58] *Id.*

Act of July 15, 1870, *i.e.*, to preclude military control of the government and to prevent interference with military duties. The statute prohibits military personnel from accepting dual employment in what may be described as the upper echelons of our government. It does not express an inherent incompatibility between military service and all federal civilian employment. As such, there appears to be no statutory reason to prohibit, for example, an Army officer's employment in a federal capacity as a sports official, or an AMEDD physician's part-time off-duty employment with the Veterans Administration.

Having examined the legislative history of the enactments forming the basis for the Comptroller General's position on military dual compensation, it is appropriate to review some of the decisions which cover AMEDD personnel dual compensation issues. In 1968, the Comptroller General rendered a decision concerning whether the Veterans Administration could pay for fee-basis medical care provided to eligible veterans by off-duty military physicians who were employed after duty hours with the permission of their commanding officer.[59] The decision first reiterated the general proposition that active duty officers are precluded from accepting outside employment which interferes with the performance of military duties.[60] This issue was decided by referring to the "long-established rule" that rendering services to the government in another position of employment is incompatible with military duties, actual or potential.[61] On this basis, the compensation for command approved off-duty employment with the Veterans Administration was denied.

It is apparent that the rule used to decide the Veterans Administration compensation issue was not properly applied, particularly in view of the current guidance provided by 5 U.S.C. § 973(b). A question remains, however, as to whether the additional compensation is precluded by section 5536. Although the Comptroller General did not decide on this issue, it appears from the legislative history of section 5536 that such compensation would not be prohibited. As discussed earlier, the statute was intended to apply to situations where an officer is required to perform the duties of another office.[62] Where there is no connection between the other service or duty and the service member's military duties, section 5536 does not seem to prohibit the receipt of compensation for the extra services. Thus, where an AMEDD physician's employment is not required, but is voluntary, there appears to be no connection between the two services rendered, and compensation should be allowed for both positions.

Another point to be made in the analysis of the Comptroller General's position concerns additional compensation for care provided to patients who are eligible to receive military care, but for whom such care is unavailable. In 1962, a decision was rendered on the propriety of the acceptance of Medicare funds by Navy medical officers under a fee-splitting arrangement with civilian physicians.[63] In this instance, the Navy doctors, engaging in approved off-duty employment, were treating eligible dependents of military personnel. Dependent care was unavailable at the military treatment facility. The Comptroller General held that by furnishing medical care to eligible dependents, the doctors were merely performing their official duties for which they received their Navy pay, regardless where the care was provided.[64] As such, receiving additional appropriated funds compensation in the form of Medicare payments was deemed improper.[65]

A similar case in 1982 involved dental officers who were providing care to retired personnel and accepting fees from the Veterans Administration.[66] In that case, patients were referred to the Veterans Administration because of time constraints at the military clinic. The decision noted that the two officers involved nevertheless found time to treat the referred patients in their private offices. The subsequent acceptance of additional compensation for these off-duty services was deemed to violate 10 U.S.C. § 5536.[67]

In neither of the decisions discussed above did the analysis include more than a cursory evaluation of the reasons for the unavailability of military care. Instead, the decisions relied upon the theory that because the patients had a statutory entitlement to military care, the physicians were required to provide that care and were precluded from accepting additional compensation by section 5536. While the theory correctly applies the intent of section 5536 that extra duties may not be compensated for if such duties are required, the analysis of entitlement to care appears to be faulty.

Although members or former members[68] and dependents[69] are entitled to medical and dental care, such care is always "subject to the availability of space and facilities and the capabilities of the medical and dental staff."[70] In each of the decisions discussed above, the patients were referred to a civilian practice by the military clinic. Generally, referral from a military clinic to a civilian practice which is to be compensated from appropriated funds presupposes a

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[59] 47 Comp. Gen. 505 (1968).

[60] *Id.*

[61] *Id.* at 506. *See also* U.S. Gen. Acct. Off., Office of the Gen. Counsel, Military Personnel Law Manual, 1–13, 1–15 (1983).

[62] Converse v. United States, 62 U.S. 463, 469 (1859). *See supra* text accompanying notes 5–7.

[63] 41 Comp. Gen. 741 (1962).

[64] *Id.* at 19.

[65] *Id. See also* U.S. Gen. Acct. Off., Office of the Gen. Counsel, Military Personnel Law Manual, 1–16 (1983).

[66] Ms. Comp. Gen. B–207109 (29 Nov. 1982).

[67] *Id.* at 19.

[68] 10 U.S.C. § 1074(b) (1982)

[69] 10 U.S.C. § 1076(a) (1982).

[70] *Id.*

lack of adequate military care.[71] By virtue of their statutory entitlement, eligible patients should not be referred if military care is available. However, in the two decisions discussed above, the Comptroller General in effect determined that unavailability does not relieve the military of the requirement to provide care. The entitlement statutes[72] clearly do not support this position. Because there is no entitlement to military care if such care is unavailable, there is no requirement to provide such care and section 5536 should not be applied to preclude extra compensation for rendering the treatment.

Having reviewed the Comptroller General's position on dual compensation, it is appropriate to examine DA's position in this area.

V. The Army Position

The Department of the Army's position on dual compensation and the applicability of section 5536 is contained in two general areas. First, all Army personnel are subject to the regulatory requirements for standards of conduct. Second, the Office of The Judge Advocate General has issued a number of opinions dealing specifically with the effects of section 5536.

The standards of conduct regulation[73] provides guidance with respect to conflicts of interest in general, and outside employment in particular. As a general policy, DA personnel must avoid any action, whether or not specifically prohibited by the regulation, that might result in or reasonably be expected to create the appearance of using public office for private gain,[74] or affecting adversely the confidence of the public in the integrity of the government.[75]

More specifically, DA personnel are advised in the regulation that outside employment or other outside activity, either with or without compensation, may create a conflict or the appearance of a conflict of interest.[76] Additionally, service members may not use their official positions to induce, coerce, or in any way influence any person, including subordinates, to provide any unauthorized benefits, financial or otherwise, to themselves or others.[77] While these regulatory provisions do not address section 5536, they must be considered in resolving any dual compensation issue.

A simple example in this area would be a situation where an AMEDD physician personally refers a patient from a military clinic to his or her own off-duty private practice. This would constitute a clear violation of the prohibition against using public office for private gain.[78] Such a case was considered in a recent Comptroller General decision.[79] In that case, Air Force dental officers made personal referrals to their own off-duty private practices.[80] Although the case was not decided on this issue, there is no doubt that the officers' acts violated the Air Force standards of conduct.

The issue of referred patients poses a particular problem for AMEDD personnel engaged in off-duty private practice. In theory, any referral by one AMEDD physician to the off-duty private practice of another AMEDD physician would constitute the use of public office for the private gain of another. To avoid a conflict of interest problem, AMEDD personnel would be well advised to refrain from making or accepting such referrals. However, referrals through another disinterested person or agency may be sufficient to avoid the conflict of interest problem.

The standards of conduct regulation also prohibits DA personnel from engaging in outside employment which interferes with or is not compatible with the performance of government duties, which may reasonably be expected to bring discredit upon the government, or which is otherwise inconsistent with the requirements of the regulation.[81] These restrictions operate independently of any other statutory or regulatory requirements.[82]

The Army position regarding section 5536 and dual compensation is also reflected in the opinions of The Judge Advocate General. These opinions have been consistent with the decisions of the Comptroller General. The principal opinion in this area concerned the propriety of off-duty AMEDD personnel receiving compensation for their professional services from appropriated fund sources such as Medicare, Medicaid, and CHAMPUS.[83] In advising against such remunerative employment, the opinion referred to decisions of the Comptroller General which indicated that the statutory prohibition of 5 U.S.C. § 5536 against "dual compensation" would be violated by receipt of payment from any third party fiscal intermediary which is funded entirely or in part from appropriated funds.[84] Essentially, the opinion relied upon the Comptroller General's

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[71] *See, e.g.*, 32 C.F.R. § 199.9(a) which states in part "the use of CHAMPUS may be denied if a Uniformed Service medical facility capable of providing the needed care is available."

[72] 10 U.S.C. § § 1074(b), 1076(a) (1982).

[73] AR 600–50.

[74] *Id.* at para. 1–5*e*(1).

[75] *Id.* at para. 1–5*e*(6).

[76] *Id.* at para. 2–1*c*.

[77] *Id.* at para. 2–1*e*.

[78] *Id.*

[79] Ms. Comp. Gen. B–207109 (29 Nov. 1982).

[80] *Id.* at 13.

[81] AR 600–50, para. 2–6.

[82] *See, e.g.*, 10 U.S.C. § 973 (1982); AR 40–1.

[83] DAJA–AL 1984/1056, 27 Feb. 1984.

[84] *Id.*

position that an active duty service member may not hold civilian employment in the U.S. Government and be paid from appropriated funds for that position, unless a statute expressly authorized such employment and payment.

The Office of the Judge Advocate General has provided further guidance in this area in the form of the reference Guide to Prohibited Activities of Military and Former Military Personnel.[85] This publication offers a general proscription against holding a concurrent federal civilian position or the direct receipt of federal compensation for services rendered.[86] Officers are advised to examine dual compensation situations to ensure that no "sham" or "subterfuge" is present which would, in effect, allow a soldier to occupy a federal civilian position or receive direct federal compensation.[87] The Guide also advises AMEDD officers that they should not engage in off-duty practice involving the care of persons whose medical care is paid for by the government (*e.g.* CHAMPUS, Medicare, or Medicaid).[88]

While there are other opinions[89] and federal regulations[90] which discuss the impact of section 5536 on military personnel, the guidance provided depended upon the decisions of the Comptroller General. However, the basis for the Comptroller General and DA positions is questionable. The legislative history and judicial interpretations of section 5536 simply do not suggest an inherent incompatibility between military service and federal civilian employment.

VI. Conclusion

As the preceding discussion indicates, the issues encompassed in the statutory prohibition against the receipt of extra compensation are complex. A brief review of the principal points would be helpful in bringing the material into perspective.

To restate the problem, AMEDD physicians who engage in approved off-duty employment are prohibited from accepting compensation which comes from appropriated funds sources.[91] This effectively precludes Army doctors from accepting part-time employment at Veterans Administration hospitals or from treating patients whose care is paid for by federal programs such as Medicare, Medicaid, or CHAMPUS.

The prohibition is essentially derived from the Comptroller General's interpretation of 10 U.S.C. § 973 and 5 U.S.C. § 5536. The Comptroller General has determined that 10 U.S.C. § 973 and its statutory predecessors provide a federal expression of the inherent incompatibility between being an active duty Army officer and holding a civil office.[92] Having first determined that federal civil employment is prohibited, the Comptroller General then applies 5 U.S.C. § 5536 to preclude compensation for extra services that may have been rendered. This analysis leaves considerable room for questioning.

To begin with, the legislative history of 10 U.S.C. § 973 indicates that Congress' intent in enacting the law was to prevent service members from filling civil offices which would allow the military to become paramount to the civil branch of government.[93] In more basic terms, Congress intended to ensure civilian control over the government, not prevent an AMEDD doctor from engaging in off-duty employment with the Veterans Administration. Further, the recent revision to section 973 sets forth specific positions that cannot be filled by service members.[94] Those positions are upper echelon offices, in keeping with the original intent of Congress.

The legislative history of 5 U.S.C. § 5536 suggests that Congress intended to preclude extra compensation for performing the duties of one office. The statute was not intended to prohibit dual compensation for performing the duties of two separate and distinct offices. The Supreme Court's interpretation of the statute is consistent with the intent of Congress. Where the two offices are separate and distinct, and the officer is not required to perform the duties of the second office, section 5536 does not prohibit the receipt of dual compensation.[95]

It would appear that the Comptroller General's position, and therefore the Army's policy, is questionable. This is true at least with respect to the off-duty AMEDD officer's receipt of dual compensation from appropriated funds.

In analyzing the dual compensation problem, a few practical considerations should also be mentioned. For example, what purpose is served by prohibiting an AMEDD doctor from moonlighting at a Veterans Administration hospital? It cannot be to preclude interference with military duties, because a lack of interference is a regulatory prerequisite to being allowed to practice off-duty.[96] Likewise, it cannot be to ensure civilian control of the government, because section 973 sets out in detail the positions excluded to military personnel. Nor can it be to prevent conflict of interest

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[85] DAJA-AL 1984/2666, 4 Sept. 1984.

[86] *Id.* at para. 2-5*b*.

[87] *Id.*

[88] *Id.* at para. 2-7*c*.

[89] *See, e.g.*, DAJA-AL 1976/3661, 19 Feb. 1976; DAJA-AL 1976/3604, 17 Feb. 1976; DAJA-AL 1974/4077, 25 Oct. 1974.

[90] *See, e.g.*, 32 C.F.R. § 199.12(a)(3), discussing the application of 5 U.S.C. § 5536 (1982) to the payment of CHAMPUS benefits.

[91] 5 U.S.C. § 5536 (1982).

[92] 20 Comp. Gen 885, 888 (1941).

[93] Cong. Globe, 41st Cong., 2d Sess. App. 150 (1870); Pub. L. No. 98-94, 1983 U.S. CODE CONG. & AD. NEWS (97 Stat.) 1170.

[94] 5 U.S.C. § § 5312 to 5317 (1982).

[95] Woodwell v. United States, 214 U.S. 82 (1909); United States v. Saunders, 120 U.S. 126, 129 (1887).

[96] 10 U.S.C. § 973(a) (1982); Dep't of Defense Directive No. 5500.7, Standards of Conduct (15 Jan. 1977); AR 40-1, para 1-8*a*; AR 600-50, para. 2-6.

problems, because the standards of conduct regulation provides that control.[97] In short, the policy appears to have no overriding purpose which is not already provided for elsewhere.

A second issue which must be addressed is whether the policy is realistic. First, the prohibition places off-duty doctors and their patients in the untenable position of having to check backgrounds prior to treatment; the doctors to ensure compensation, and the patients to ensure receipt of benefits. This is not feasible in an emergency situation. Second, aside from the issues surrounding Medicare, Medicaid, and CHAMPUS, federal involvement in medical research must also be considered. The current prohibition extends to both direct and indirect compensation, so an AMEDD officer technically would be precluded from participating in such work where additional federal funds are involved. Finally, off-duty employment is a significant incentive in recruiting and retaining AMEDD personnel, and the prohibition against the receipt of extra compensation materially detracts from that benefit.

The prohibition against receiving extra federal compensation is not realistic, equitable, or required. Perhaps it is time for the Comptroller General to re-think this position with respect to dual compensation in general and section 5536 in particular.

[97] AR 600–50.

Nonmonetary Contract Interpretation at the Boards of Contract Appeals

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I. Introduction

During the administration of government contracts, disputes arise where it is necessary to seek an interpretation of contract terms. Often, these disputes occur before any work has been performed or any costs incurred under the contract. If the parties cannot resolve these disputes, the issues are brought before either boards of contract appeals or the Claims Court for resolution. This article will explore the authority of boards of contract appeals to interpret the terms of a government contract where no monetary relief has been requested by either the government or the contractor. We will first examine a brief background of the basic authority of the boards. Next, the legislative history of the Contract Disputes Act of 1978 (CDA)[1] will be discussed to see both congressional and contractor views on the boards' authority to grant nonmonetary contract interpretation. Finally, this article will discuss the decisions from the various boards concerning their authority to grant nonmonetary contract interpretation.

II. Background

Boards of contract appeals (boards) are not courts and do not possess the broad powers of awarding the diverse types of relief that are normally authorized to courts. The CDA states that the purpose of a board is to "provide to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes, and shall issue a decision in writing or take other appropriate action on each appeal submitted."[2] Boards are responsible under the CDA for deciding claims made by either the contractor or the government.[3] The term "claim" as used in the standard disputes clause contained in government contracts is defined as "a written demand or assertion by one of the parties seeking, as a legal right, the payment of money, adjustment or interpretation of contract terms, or any other relief, arising under or relating to a contract."[4] Is a request for contract interpretation without monetary relief a claim under the CDA?

The issue has arisen of whether a board's authority to interpret a contract where no monetary relief is involved is really a declaratory judgment. There is no question that boards can interpret contract terms where monetary relief is requested. Declaratory judgments are authorized under the Declaratory Judgments Act[5] and enable courts to declare the rights and other legal relations of any interested party whether or not further relief is sought. There must be an actual controversy present for a court to exercise its declaratory judgment authority. The definition of "declaratory judgment" states that it is a "remedy for the determination of a justiciable controversy where the plaintiff [or defendant] is in doubt as to his legal rights."[6] When boards interpret contract terms without monetary relief being requested, is it contract interpretation or a declaratory judgment in disguise? The legislative history of the CDA is instructive as to Congress' intentions concerning the scope of authority conferred on boards concerning declaratory judgments.

III. Legislative History

The hearings on the CDA provided fertile ground for discussions on whether boards and the Court of Claims (now the Claims Court) were to have authority to grant declaratory judgment-type relief. It must be noted that most of the debate centered on whether the Court of Claims should have such declaratory judgment authority. It is helpful to examine these debates and hearings concerning declaratory judgment authority in the Court of Claims, as the final version of the CDA provided boards the same authority to decide and determine disputes as was possessed by the Court of Claims.[7] If there had been any declaratory judgment authority given to the Court of Claims, and not reserved to that court, boards would also have authority to grant such relief.

The House of Representatives (House) version of the CDA provided for the Court of Claims to have authority to grant declaratory judgments.[8] The Justice Department found problems in allowing the granting of declaratory judgments where no monetary claims against the United States were involved.[9] They reasoned that the potential of a declaratory judgment suit being initiated each time a contractor disagreed with the government's instructions on a

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[1] 41 U.S.C. §§ 601–613 (1982).

[2] 41 U.S.C. § 607(e) (1982).

[3] 41 U.S.C. § 605(a) (1982).

[4] Federal Acquisition Reg. § 52.233–1 (1 April 1984) [hereinafter cited as FAR].

[5] 28 U.S.C. § 2201 (1982)

[6] Black's Law Dictionary 368 (rev. 5th ed. 1979).

[7] The provision of 41 U.S.C. § 607(d) (1982) of the Act is the so-called flow down provision of the Act. It is designed to give boards the same authority to decide all contract disputes that the Claims Court possesses.

[8] H.R. Rep. No. 1556, 95th Cong., 2d Sess. 10 (1978).

[9] *Id.* at 38–40; *Contract Disputes: Hearings on H.R. 664 and Related Bills Before the Subcommittee on Administrative Law and Governmental Relations of the Committee on the Judiciary,* 95th Cong., 1st Sess. 89 (1977) (statement of Irving Jaffe, Deputy Assistant Attorney General, Civil Division, DOJ) [hereinafter cited as Hearings].

contract would unduly delay contract performance.[10] The Justice Department's views were strongly supported by representatives from the National Conference of Boards of Contract Appeals,[11] General Services Administration,[12] Office of Federal Procurement Policy,[13] Department of Defense[14] and the NASA Board of Contract Appeals.[15] Declaratory judgment authority was strongly supported by the Court of Claims[16] and the American Bar Association.[17] Judge Davis of the Court of Claims stated that declaratory judgments would not present an undue burden or intrusion on the procurement system.[18]

The Senate version of the CDA became embroiled in the same issues concerning declaratory judgements as did the House bill. The testimony at the Senate hearings largely paralleled the testimony during the House hearings concerning the problems with declaratory judgments and their effect on the procurement system.[19] In addition to providing general declaratory judgment authority, the Senate Report on S. 3178 (Senate version of the CDA) provided express authority to the Court of Claims to "declare the rights of any person with respect to trade secrets, data submitted pursuant to express or implied contract provisions restricting disclosure, and privileged or confidential information pursuant to an offer or unsolicited proposal."[20] The scope of the declaratory judgment authority was thereby broadened to include cases involving patent and data rights issues in the Senate bill reported out of committee. Many of those testifying before the Senate committees considered the declaratory judgment provisions for patent and data rights to be more important than general declaratory judgment authority.

During the Senate debate on the bill, Senator Robert Byrd, one of the CDA's sponsors, stated that the section concerning declaratory relief had been eliminated.[21] He offered an explanation of the deletion and amendment of the Senate bill:

> Section 14(k) [declaratory judgments] of the reported S. 3178 [Senate bill] has been eliminated from the Act. This section would have given the Court of Claims jurisdiction under the Declaratory Judgments Act. The elimination of this provision addresses the concerns expressed by the Justice Department, Department of Defense and the [Senate] Armed Services Committee that allowing the Court of Claims declaratory judgment authority would undermine the disputes resolving process by permitting, in some cases, access to the court before presentation of a claim to the contracting officer . . . I do not believe that S. 3178 is the correct forum for making this change in the jurisdiction of the Court of Claims.[22]

Congress was concerned not only with potential delays declaratory judgments could cause in contract performance, but also with contractors bypassing the contracting officer and bringing disputes directly to either a court or board.

The Federal Courts Improvement Act of 1982 (FCIA)[23] expanded the authority of the Claims Court (former Court of Claims Trial Division) with regard to declaratory judgments. The FCIA vested the Claims Court with the authority to "afford complete relief on any contract claim brought before the contract is awarded, [and] the Court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper."[24] The legislative history of the FCIA states that because the Claims Court is granted exclusive jurisdiction concerning pre-award declaratory relief, boards would not possess comparable authority pursuant to section 607(d) of the CDA.[25] Congress thereby specifically intended to restrict the limited declaratory judgment jurisdiction to the Claims Court. In effect they were saying that the FCIA provides the only declaratory judgment authority the Claims Court has in contract cases and that boards do not possess even that small grant of declaratory judgment authority.

The legislative histories of both the CDA and the FCIA make it clear that boards were not given declaratory

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[10] H.R. Rep. No. 1556, 95th Cong., 2d Sess. 38–39 (1978); Hearings, *supra* note 9, at 89 (statement of Irving Jaffe, Deputy Assistant Attorney General, Civil Division, DOJ).

[11] Hearings, *supra* note 9, at 231–32 (statement of Russell C. Lynch, Chairman, Legislative Liaison Committee, National Conference of Boards of Contract Appeals).

[12] H.R. Rep. No. 1556, 95th Cong., 2d Sess. 62–63 (1978).

[13] Hearings, *supra* note 9, at 74 (statement of Lester Fetting, Administrator of Federal Procurement Policy, OMB).

[14] H.R. Rep. No. 1556, 95th Cong., 2d Sess. 58 (1978).

[15] *Id.* at 103.

[16] *Id.* at 30; Hearings, *supra* note 9, at 81 (statement of Oscar H. Davis, Acting Chief Judge, United States Court of Claims).

[17] Hearings, *supra* note 9, at 134–35 (statement of Allan J. Joseph, Chairman, Public Contract Law Section, American Bar Association).

[18] *Id.* at 81 (statement of Oscar H. Davis, Acting Chief Judge, United States Court of Claims).

[19] S. Rep. No. 1118, 95th Cong., 2d Sess. 34–35 (1978); *Contract Disputes Act of 1978; Joint Hearings on S. 2292, 2787, 3178, Before the Subcommittees on Federal Spending Practices and Open Government of the Committee on Government Affairs and the Subcommittee on Citizens' and Shareholders' Rights of the Committee on the Judiciary, United States Senate,* 95th Cong., 2d Sess. 177–178 (1978) (Statement of Irving Jaffe, Deputy Assistant Attorney General, Civil Division) [hereinafter cited as Senate Hearings].

[20] S. Rep. No. 1118, 95th Cong., 2d Sess. 34–35 (1978); Senate Hearings, *supra* note 19, at 278 (Statement of C. Stanley Dees, District of Columbia Bar Association). [This provision was deleted from the final version of the Act.]

[21] 124 Cong. Rec. 36267 (1978).

[22] *Id.* at 36267.

[23] The Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, 96 Stat. 25 (codified in scattered sections of 28 U.S.C.).

[24] 28 U.S.C. § 149(a)(3) (1982).

[25] S. Rep. No. 275, 97th Cong., 1st Sess. 22–23 (1981).

judgment authority. Moreover, the procurement community generally seemed disinclined to request that such power be granted to the boards. However, the definition of a claim contained in the standard disputes clause concerning the "adjustment or interpretation of contract terms or other relief"[26] arising under or relating to a contract presents possibilities for boards to award declaratory type relief without monetary claims being filed.

IV. Interpretation of Contract Terms or Declaratory Judgment?

A. Pre-CDA Cases

Prior to the CDA, boards were presented with appeals that required interpretation of contract terms where no monetary relief was requested. While boards were deciding such cases infrequently, questions arose concerning whether under the limited pre-CDA authority of boards, nonmonetary contract interpretation was within their jurisdiction. It must be remembered that the boards' pre-CDA jurisdiction was limited to issues arising under the contract.[27] However, the disputes clause in effect prior to the CDA did not impose a requirement to have a monetary claim attached to requests for contract interpretation. During the pre-CDA period, the Armed Services Board of Contract Appeals (ASBCA) had the most nonmonetary relief cases brought before it.

In *New England Tank Industries of New Hampshire,*[28] the ASBCA was presented with the question of whether an existing contract had been modified by the parties to provide for the government's release of an option. The board stated it had authority to decide the issue and held that no agreement had been reached to modify the contract and that no release had been executed. The board held that its authority and jurisdiction to decide the issue did not depend upon the ability to award damages for breach of contract or other equitable relief.[29]

In *Airesearch Manufacturing Company,*[30] the ASBCA was asked to interpret whether the Cost Accounting Standards (CAS) applied to the contract. The contracting officer had issued a final decision stating that the contractor was not in compliance with CAS, but could not make an assessment of the dollar impact resulting from the noncompliance with CAS. The ASBCA held that it had the authority to make a determination concerning a contractor's compliance with CAS, as it was the intent of the legislation implementing CAS to provide for settling CAS disputes whether or not monetary relief was demanded.[31]

In *Windward Moving and Storage,*[32] the contractor appealed the government's denial of the contractor's request to accept additional poundage of household goods to be moved under the contract. The contracting officer stated that the contract only allowed the contractor a maximum workload as there was no clause allowing additional poundage. The ASBCA found that previous contracts had permitted the incumbent contractor additional poundage even when there was no clause present to authorize poundage over the specified maximum. The board held that it had the authority to decide this case involving a request for nonmonetary relief because of its authority to interpret and construe the contract, as written, for the guidance of the contracting officer in his continued administration of the contract.[33]

The ASBCA, in *Nytek Electronics,*[34] was presented the question whether a valid contract had come into existence. The contracting officer determined that award of the contract to Nytek was illegal because of a violation of procurement regulations, and cancelled the contract. The contractor claimed that the contract award was valid and the subsequent cancellation was a termination for convenience. The board held that it had authority to determine the existence of a contract since such determination was a necessary predicate to the resolution of a dispute alleged to arise under the terms of a contract.[35] The board found the contract award to be valid and held that the cancellation was a termination for convenience.

In all four cases, the ASBCA appeared to say that contract interpretation that will aid the parties in the smoother administration of government contracts is permitted. The ASBCA's language in *Windward* concerning the guidance it furnished to contracting officers for the future administration of the contract is evidence that the board desired to use its contract interpretation authority to decide cases before disputes arose with cost impacts. It appears that the ASBCA was attempting to engage in money-saving preventive law by its decisions in these cases. This preventive theme has been used numerous times by the board.

Historically, boards have heard appeals involving the respective rights and obligations of the parties under patent and technical rights clauses. In *Compudyne Corp.,*[36] the contractor claimed that the government had misused proprietary information acquired under the data rights clause of the contract. The contractor contended that the government did not have an unlimited right or license to use and disclose data acquired under the contract and that use of the data was restricted to uses specified in the contract. The

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[26] FAR § 52.233-1.

[27] *See* United States v. Utah Construction Mining Co., 384 U.S. 394 (1966).

[28] ASBCA No. 19251, 77-1 B.C.A. (CCH) para. 12,538.

[29] *Id.* at 60,775.

[30] ASBCA No. 20998, 76-2 B.C.A. (CCH) para. 12,150, *aff'd on reconsideration,* 77-1 BCA para. 12,546.

[31] *Id.* at 60,831.

[32] ASBCA No. 15056, 70-2 B.C.A. (CCH) para. 8537.

[33] *Id.* at 39,694.

[34] ASBCA No. 20019, 75-1 B.C.A. (CCH) para. 11,299.

[35] *Id.* at 53,868-869.

[36] ASBCA No. 14556, 72-1 B.C.A. (CCH) para. 9218.

ASBCA stated it had authority to determine the scope of rights conferred on both parties for data delivered under the data rights clause of contracts and could provide an administrative remedy.[37] The board held that as the contractor had failed to place a restrictive legend on the data reserving rights to it, the absence of restrictions negated any implied agreement that the data was submitted in confidence. Therefore, the board held the nonconfidential disclosure of the data placed it in the public domain as a matter of law.[38]

In *Teledyne Continental Motors, Division of Teledyne Industries, Inc.*,[39] the ASBCA was presented the issue whether the government could remove restrictive legends concerning patents from data submitted pursuant to the rights in technical data clause of the contract. The clause permitted the government to remove any restrictive legends not authorized by the contract unless the contractor could substantiate the proprietary nature of the data. The board held that the government had considerable discretion under the subject clause to determine whether retention of the restrictive legend on the data furnished with unlimited rights was proper.[40]

The ASBCA has been asked several times to determine when an invention has been reduced to practice.[41] The purpose of such a finding is to determine whether the government is entitled to a royalty free license because the invention was reduced to practice after award of the contract. In *Bell Aerospace Corp.*,[42] *General Dynamics Corporation, Electronics Division*,[43] and *Physics Technology Laboratories, Inc.*,[44] the ASBCA examined when the contractors actually reduced the inventions to practice. In both *Physics Technology* and *Bell Aerospace*, the board held that the inventions were reduced to practice during the contract period and the government was therefore entitled to a royalty free license. However, in *General Dynamics*, the ASBCA found the contractor had reduced the invention to practice prior to award and denied the government's request for a royalty free license.

The rather broad view of jurisdiction over nonmonetary declaratory judgment-type disputes espoused by the ASBCA has not found favor with all the boards. In *Historical Services, Inc.*,[45] the Department of Transportation Contract Appeals Board (DOT CAB) was presented a claim by the government that the contractor surrender possession of the printing masters of a film produced under the contract. The board was asked to render an interpretation of the contract to determine who had the right to the printing masters. No monetary claim was presented with the request for contract interpretation. The DOT CAB cited each type of equitable jurisdiction not then possessed by the boards such as reformation, rescission, and mandamus to conclude that as a forum of limited jurisdiction, it had no authority to grant the nonmonetary relief requested. It did not matter to the board whether the relief requested was a declaratory judgment, rescission, or any other type of equitable relief. The board held that its limited jurisdiction allowed only requests for monetary relief.[46]

The ASBCA has not always followed its decisions allowing disputes requesting nonmonetary contract interpretation. In *Alliance Properties, Inc.*,[47] the contractor submitted a claim concerning the proper method for the government to make partial payments under the contract. By the time the case reached the ASBCA, the contractor had received full final payment under the contract and the issue was moot. The contractor realized no issue remained as to the method or amount of partial payments, but pressed the appeal because "its interest in a decision of the question presented was based largely on the far reaching implications it envisioned for the administration of [future] contracts."[48] The board dismissed the appeal, stating that neither its rules nor charter contemplated the entry of what would amount to a declaratory judgment in the case.[49]

The *Alliance* decision appears to be limited to its facts as no dispute was pending between the parties and no contract was in effect. If the *Alliance* decision is contrasted with the ASBCA's decision in *Windward*, logic can be seen in the board's denying jurisdiction because any decision rendered could not aid either the government or the contractor in the further administration of an ongoing contract. The board appears to be willing to hear cases when there is a contract administration or interpretation dispute that may later have a cost impact on the parties, but does not accept cases where there is no possibility of such impact. The board appears unwilling to take on the role of Congress or the agency in rewriting clauses or procedures for the aid of future contractors.

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[37] *Id.* at 42,771.

[38] *Id.* at 42,772–73.

[39] ASBCA No. 16516, 75–2 B.C.A. (CCH) para. 11,553.

[40] *Id.* at 55, 135–36.

[41] "Reduction to practice" is defined in Black's Law Dictionary 1150 (rev. 5th ed. 1979) as "respects priority of invention for purposes of patentability is accomplished when inventor's conception is embodied in such a form as to render it capable of practical and successful use."

[42] ASBCA No. 9005, 67–1 B.C.A. (CCH) para. 6203.

[43] ASBCA No. 14466, 73–1 B.C.A. (CCH) para. 9960.

[44] ASBCA No. 17979, 77–1 B.C.A. (CCH) para. 12,301.

[45] DOT CAB No. 71–8, 71–1 B.C.A. (CCH) para. 8903.

[46] *Id.* at 41,371–72. *See* United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966).

[47] ASBCA No. 10471, 65–2 B.C.A (CCH) para 5210.

[48] *Id.* at 24,473.

[49] *Id.*

B. Cases Under the Contract Disputes Act

The material presented in the prior section evidences a favorable view by at least the ASBCA that contract interpretation where no monetary claim is involved is permissible if it aids the parties in resolving disputes and thus avoiding future disputes or cost impacts. Such decisions are akin to declaratory judgments in their result as they declare the rights and other legal obligations of the parties whether or not further relief is sought. As noted in Part II of this article, both the CDA and the current disputes clause require parties to submit claims to the boards for, among other things, contract interpretation arising under or relating to a contract.

The language in the disputes clause which mentions "contract interpretation" does not define that term. In rendering decisions concerning nonmonetary contract interpretation, boards are mindful of the Supreme Court's decision in *United States v. King*, which held that the Court of Claims did not have authority to render declaratory judgments because the Declaratory Judgments Act did not expand that court's jurisdiction beyond the Tucker Act's strictures of deciding only cases involving monetary relief.[50] What the boards are attempting to accomplish in rendering nonmonetary contract interpretation can easily be classified as a declaratory judgment, considering the result of such decisions. A literal reading of *King* read with the flow down provisions of section 607(d) of the CDA,[51] leads one to believe that boards are precluded from granting declaratory judgment type relief.

King has presented problems to boards that want to provide nonmonetary contract interpretation relief. Boards have attempted to circumvent *King* by using the term "contract interpretation" to grant relief. The major case in this area is the ASBCA's decision in *McDonnell-Douglas Corporation*.[52] In *McDonnell*, the Comptroller General requested contractor records pursuant to a contract clause, and the contractor refused to furnish the records. The ASBCA held:

> [H]istorically and traditionally the Board has assumed jurisdiction over issues involving disputes as to the interpretation of contract provisions and determination of the rights and obligations of the parties under provisions of a contract even though the Court of Claims might have declined jurisdiction on the ground that a declaratory judgment would be involved.[53]

The board in *McDonnell* went into a lengthy discussion and analysis of pre-CDA cases, where boards determined the rights and obligations of the parties without monetary claims.

The ASBCA in *McDonnell* stated that the effect of the CDA was not intended "to diminish or curtail the Board's authority [existing prior to the Act] to determine the respective rights of the parties when no monetary relief is requested or awarded."[54] The board stated that it derived its authority to award such relief from the CDA, contracts, and its charter.[55] The ASBCA's charter was unchanged by the CDA and still provides for that board to hear, consider, and determine appeal on disputed questions.[56] The term "disputed questions" is not defined. The board stated that the CDA did not reduce its pre-CDA power to issue decisions which "determine the parties' respective legal rights and obligations, as in a declaratory judgement."[57] Moreover, the board stated that "the jurisdiction or authority to grant certain types of relief of the agency boards of contract appeals as quasi-judicial administrative tribunals does not derive from or depend on the Declaratory Judgments Act."[58] The board concluded that because it was not subject to the Declaratory Judgments Act's restrictions of such relief to courts, it was able to award declaratory judgments.

The ASBCA's decision in *McDonnell* was cited with approval by the General Services Board of Contract Appeals (GSBCA) in *Ulric McMillan*.[59] In that case, the GSBCA was requested to issue an order which amounted to an injunction. The GSBCA denied the request for injunctive type relief, but affirmed its authority to award declaratory judgment type relief, stating:

> We have always possessed an equitable remedy that the former United States Court of Claims did not possess, that is the ability to issue a declaratory judgment, at least in the sense of declaring the respective rights and obligations under the contract, without need to enter a money judgment.[60]

Similarly, in *GT Warehousing Co.*,[61] the GSBCA was asked to determine whether the contractor or the government was responsible for doing floor sealing work under the contract. The board stated that as neither party had done the work, or incurred any costs, the parties were in fact asking for a declaratory judgment. The board stated that is saw no reason why it could not continue its pre-Act authority to decide disputes even though no money changed hands.[62]

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[50] 395 U.S. 1, 4 (1969).

[51] *Supra* note 7.

[52] ASBCA No. 26747, 83–1 B.C.A. (CCH) para. 16,377 at 81,421.

[53] *Id.*

[54] *Id.* at 81,422. *Accord* Allied Repair Services, Inc., ASBCA No. 2619, 82–1 B.C.A. (CCH) para. 15,785 at 78,159–60.

[55] *McDonnell*, 83–1 B.C.A. (CCH) at 81,422.

[56] Defense Supplement to Federal Acquisition Reg. Appendix A (1 April 1984).

[57] *McDonnell*, 83–1 B.C.A. (CCH) at 81,422.

[58] *Id.* at 81,420.

[59] GSBCA Nos. 7029–COM, 7070–COM, 83–2 B.C.A. (CCH) para. 16,595 at 82,507.

[60] *Id.*

[61] GSBCA No. 6860, 84–1 B.C.A. (CCH) 17,006 at 84,701–702.

[62] *Id.*

The ASBCA's pre-CDA and post-CDA reasoning for allowing nonmonetary declaratory judgment-type relief has also been followed by the Postal Service Board of Contract Appeals (PSBCA). The PSBCA, in *Greater Eastern Holding Company,*[63] was requested to determine in advance of work being done that the government was liable for roof repair and replacement under the contract. The government opposed this request as no liabilities had been incurred and such a determination by the PSBCA would be premature and akin to a declaratory judgment. The board rejected the government's position stating that waiting until costs were incurred "would make it difficult for either of the parties to take steps which might mitigate damages and permit alternative courses of action."[64] The board considered the contractor's request to be a valid claim of contract interpretation within its jurisdiction as the respective rights of both parties would be affected by the liability determination of the board.[65] The board's reasoning in *Greater Eastern Holding Company* is consistent with the ASBCA's rationale in both *Windward* and *McDonnell* that permits nonmonetary relief to guide the parties and avoid later cost impact.

Not all boards have agreed that they possess authority to award nonmonetary contract interpretation relief. A consistent foe of awarding such relief has been the Agriculture Board of Contract Appeals (AGBCA). The AGBCA has taken a strict constructionist view of its authority under the CDA. The AGBCA, in *Rough and Ready Timber Co.,*[66] was presented the issue of the government imposing a new requirement on the contractor, but no additional costs or other monetary impact were alleged by the contractor. The contractor requested the board to declare the new requirement to be a breach of contract, and stated it would submit a monetary claim when and if the new requirement resulted in an increase in its costs. The AGBCA, in denying relief, held that "in the absence of a proper delegation of jurisdiction in the Board's Charter, which is not included in the Act [CDA], the Board's authority to grant relief on a contract claim is limited to the same relief available to the litigant in the Court of Claims."[67] The AGBCA reasoned that as the Court of Claims had no authority under the CDA to provide the requested relief, neither did the board.[68]

In *Pine Mountain Lumber Company,* the AGBCA reasoned that its jurisdiction and the extent of relief it may grant must be found either in its charter or derivatively from the jurisdiction of the Court of Claims under section 607(d) of the CDA.[69] The AGBCA's charter did not provide for declaratory relief either prior to or after passage of the CDA. Moreover, the board stated that a claim was required to enable it to act on an appeal. The AGBCA defined claim as a monetary demand by either party.[70] If the contractor had performed the work, incurred costs, and submitted a monetary claim, the board would have had to interpret relevant contract provisions incident to deciding entitlement under the claim. In the absence of a monetary demand, the board held there was no claim over which it which it could take jurisdiction. Similarly, in *Aero Lift, Inc.,* the AGBCA dismissed an appeal involving the contractor's request for advance approval for construction of new equipment because it determined that a proper claim under the CDA (and the board's definition of a claim) had not been submitted.[71] The AGBCA held that because no costs were incurred and no request for monetary relief submitted, the claim was premature and amounted to a request for a declaratory judgment, which could not be granted.[72]

In *Interstate Reforesters,*[73] the contractor asked the contracting officer for a definition of the term "unreasonable" as used in the suspension of work clause of the contract. The contractor was not satisfied with the government's definition of a reasonable or unreasonable length of time for a delay or suspension of work and requested the AGBCA provide its interpretation of the term unreasonable. The board considered the contractor's claim to be a request for a declaratory judgment and held that as the CDA did not confer specific jurisdiction to issue declaratory judgments, it had no jurisdiction to grant the contractor's request.[74]

In *Seaboard Lumber Company, A Division of Norcliffe Company,*[75] the contractor requested the AGBCA to determine whether notices of breach of contract issued by the government were improvident because the contract was eligible for a time extension under regulations issued after the contract was entered. The government had stated that the regulations concerning contract extension in effect at the time of contract execution were applicable, and if the contractor failed to pay extension deposits, contract cancellation would result. No cancellation action had occurred and no claim for breach damages had been submitted by the contractor. The AGBCA held that the question whether this contract qualified under the extension provisions of the new regulation was a request for a declaratory judgment and not within the board's jurisdiction,[76]

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[63] PSBCA No. 1128, 83-2B.C.A. (CCH) para. 16,784.

[64] *Id.* at 83,429.

[65] *Id.* at 83,428-429.

[66] AGBCA Nos. 81-171-3, 81-172-3, 81-173-3, 81-2 B.C.A. (CCH) para. 15,173.

[67] *Id.* at 75,099.

[68] *Accord* Chas. Hummel, AGBCA No. 80-147-4, 81-1 B.C.A. (CCH) para. 14,968 at 74,070.

[69] AGBCA No. 83-1940-1, 83-2 B.C.A. (CCH) para. 16,800 at 83,957.

[70] *Id.*

[71] AGBCA No. 83-314-1, 84-1 B.C.A. (CCH) para. 17,129.

[72] *Id.* at 85,313.

[73] AGBCA No. 84-177-3, 84-2 B.C.A. (CCH) para. 17,504.

[74] *Id.* at 87,183.

[75] AGBCA Nos. 84-103-1, 84-131-1, 84-2 B.C.A. (CCH) para. 17,348.

[76] *Id.* at 86,446.

and dismissed the appeal without prejudice so that the contractor could bring the issue again once monetary damages had been suffered.

The restrictive view of the AGBCA concerning nonmonetary relief has been followed by several other boards. The Engineer Board of Contract Appeals (ENG BCA), in the *Guy F. Atkinson Company,*[77] was presented with a government request for an interpretation of the contract terms concerning the length of time the contractor had to perform the work. No monetary claim had been submitted by either party as work had not begun and no costs had been incurred. The contractor opposed this request as it wanted to wait until work had progressed to a point where the impact of any acceleration, delays, and disruptions could be ascertained. The ENG BCA denied the government's request, holding that in arriving at its decisions on substantive monetary claims it was frequently called upon to interpret obscure, ambiguous, or conflicting contract provisions, but for it to render a decision on contract interpretation without a monetary claim would be to assume a jurisdiction which Congress intentionally withheld from both the Claims Court and the boards.[78] The ENG BCA thus agreed with the AGBCA in not deciding a case before a party has a monetary stake in the outcome.

An area where boards have the potential of awarding declaratory judgment-type relief is pre-award disputes. The ASBCA and GSBCA have not addressed this issue, but the ENG BCA in *Guy F. Atkinson,*[79] and the AGBCA in *Brazier Forest Products, Inc.,*[80] both held that the FCIA did not confer on either the Claims Court or the boards any declaratory judgment authority other than the pre-award declaratory judgment power vested in the Claims Court. The ENG BCA held that the "net result of the FCIA was to leave agency Boards of Contract Appeals jurisdiction unchanged."[81] In *Brazier,* the AGBCA held that the FCIA did not confer on the Claims Court any authority to grant declaratory relief except in pre-award claims, and even that authority was exclusive of boards of contract appeals.[82] Both decisions are consistent with the opinions of those boards that there never has been authority for boards to award declaratory judgments under the CDA. In a footnote to *Walden General, Inc.,* the Interior Board of Contract Appeals held it had no authority to grant declaratory judgments.[83]

V. Discussion and Conclusion

The decisions of the ASBCA and GSBCA both prior to and after passage of the CDA present a compelling argument that the board's ability to interpret contract terms where no monetary relief is sought survived passage of the CDA. Neither the legislative history of the CDA nor the CDA itself placed limitations on or further defined the boards' authority to interpret contract terms. The definition of a claim contained in the present disputes clause allows contractors to present questions to boards concerning the interpretation of contract terms. The disputes clause does not further define the nature and extent of a board's authority to interpret contract terms. Further, there are no prerequisites on claims for contract interpretation that require such claims to be coupled with requests for monetary relief. Both the ASBCA and GSBCA recognize that in granting nonmonetary contract interpretation they are in effect awarding declaratory judgments. The ASBCA in *McDonnell* has determined that the Declaratory Judgments Act does not apply to administrative tribunals like boards of contract appeals.[84] This means that there is no specific statutory prohibition against boards granting declaratory judgment type relief as there is for the Claims Court to grant such relief.

The AGBCA and the other boards that do not allow nonmonetary contract interpretation take an overly restrictive view of their authority. The ability to grant the same relief that is available in the Claims Court under section 607(d) of the CDA should not be read to mean that boards are powerless to grant nonmonetary relief. Unless the individual agency, in writing the charter and procedures for their respective boards, limits the jurisdiction of those boards, there is no impediment to nonmonetary contract interpretation. The AGBCA's definition of claim in *Pine Mountain Lumber Company* equates a claim under the CDA with a monetary demand by either party.[85] That board's holding puts an unnecessary restriction on the ability of boards to interpret contract terms that is not found in either the standard disputes clause or the CDA. There should be no impediment to boards granting nonmonetary contract interpretation absent specific statutory prohibitions.

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[77] ENG BCA No. 4785, 83-1 B.C.A. (CCH) para. 16,406.

[78] *Id.* at 81,594.

[79] *Id.*

[80] AGBCA No. 84-121-1, 84-1 B.C.A. (CCH) para. 17,054 at 84,912.

[81] Guy F. Atkinson, 83-1 B.C.A. (CCH) at 81,594.

[82] *Brazier,* 84-1 B.C.A. (CCH) at 84,912.

[83] 82-2 B.C.A. (CCH) para. 16,090 at 79,804 n.1.

[84] McDonnell-Douglas Corporation, ASBCA No. 26747, 83-1 B.C.A. (CCH) para. 16,377.

[85] ASBCA No. 83-194, 83-2 B.C.A. (CCH) para. 16,880.

The Uniform Probate Code: Self Proving Wills Made Easier

Captain Douglas R. Wright
34th Graduate Course

Introduction

Wills written for service members should be made self proving whenever possible. Self proving statutes allow wills using specific provisions to be accepted for probate without requiring any of the witnesses to testify that the will was properly executed. This can be critical in the military context where witnesses may be spread to the four corners of the globe. Unfortunately, taking advantage of such statutes is not as simple for the legal assistance officer as it would appear to be at first glance.

Whenever the service member is domiciled in a state with self proving provisions different from the state where his or her will is to be executed, the attorney usually chooses the provision authorized by the domiciliary state on the presumption that the will is most likely to be probated there.

A disadvantage of this approach is that it ignores the law of the state of execution. Because the service member is normally stationed there, and may own property there, it is possible that his or her will may be probated there. Moreover, should the will be probated in a third state, it could be argued that the executing state's self proving provision is entitled to full faith and credit. Such an argument could not as easily be made for the provision of the domiciliary state. Nevertheless, because it would be superfluous to attach two affidavits, it is generally accepted that a choice must be made.

A Better Approach

A modern trend in the law of proving wills allows a better approach for the legal assistance officer. Since the 1975 revision of the Uniform Probate Code (UPC), a growing number of states have adopted a more relaxed self proving system which does not require appending a separate affidavit to make a will self proving. The new approach "relaxes" the requirement for a separate affidavit by allowing a final acknowledgement paragraph to be inserted as the last paragraph of the will, with a special attestation clause prior to the signatures of the witnesses, both of which are followed by a notarial certificate.[1] If this is done, no separate affidavit is required. (If the will is executed without these formalities, a self proving affidavit can be appended later.)

The official comment to the UPC revision explains:

> [T]he original text authorized only the addition to an already signed and witnessed will, of an acknowledgement of the testator and affidavits of the witnesses, thereby requiring testator and witnesses to sign twice even though the entire execution ceremony occurred in the presence of a notary or other official . . . [T]he Joint Editorial Board recommended the substitution of new text that eliminates these problems.[2]

To date sixteen states have adopted this relaxed procedure: Alabama, Alaska, Arizona, California, Colorado, Idaho, Kentucky, Maine, Montana, Nebraska, New Jersey, North Carolina, North Dakota, South Carolina, Utah, and Wyoming.[3]

The significance of this development is that in many cases it gives the legal assistance officer a chance to satisfy the law of both the state of domicile and the state of execution.

For example, suppose that a service member from Florida requests a will in North Carolina. North Carolina recognizes the relaxed procedure, while Florida recognizes only an appended affidavit. Because an acknowledgement clause and an attestation clause would be included in the will anyway, the attorney could use the North Carolina provisions in the will itself, and then append the Florida affidavit. The notary would then certify the will as well as the affidavit. Obviously the same could be done for a North Carolina resident stationed in Florida.

The flow chart at appendix A was designed to suggest solutions to these situations. The "relaxed" self proving clauses to be included in the body of the will are chosen first from the domiciliary state, if it authorizes them. If not, the execution state's provisions are used. If neither state has specific "relaxed" provisions of its own, the standard UPC versions[4] are substituted.

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[1] Uniform Probate Code § 2-504 (1975). *See* text at appendix B. (Note: The Colorado and Nebraska enactments add the following sentence after the text of the clauses: "The execution of the acknowledgement by the testator and the affidavits of the witnesses as provided for in this section shall be sufficient to satisfy the requirements of the signing of the will by the testator and the witnesses." Colo. Rev. Stat. § 15-11-504 (1984 Cum. Supp.); Neb. Rev. Stat. § 30-2329 (1979))

[2] Uniform Probate Code Official Comment to § 2-504 (1975).

[3] Ala. Code § 43-8-132 (1984 Cum. Supp.); Alaska Stat. § 13.11.165; Ariz. Rev. Stat. Ann. § 14-2504 (1984-85 Cum. Supp.); Cal. Prob. Code § 329 (West 1985 Cum. Supp.); Colo. Rev. Stat. § 15-11-504 (1984 Cum. Supp.); Idaho Code § 15-2-504 (1979); Ky. Rev. Stat. § 394.225 (1984); Me. Rev. Stat. Ann. tit. 18-A, § 2-504 (1981); Mont. Code Ann. § 72-2-304 (1983); Neb. Rev. Stat. § 30-2329 (1979); N.J. Stat. Ann. § 3B:3-4 (West 1983); N.C. Gen. Stat. § 31-11.6 (1984); N.D. Cent. Code § 30.1-08-04 (1983 Supp.); S.C. Code Ann. § 21-7-615 (Law. Co-op. 1984 Cum. Supp.); Utah Code Ann. § 75-2-504 (1978); Wyo. Stat. § 2-6-114 (1980) (Note: California does not require that the testator sign any particular acknowledgement clause; the sworn attestment of the witnesses is sufficient. *See* Cal. Prob. Code § 329 (West 1985 Cum. Supp.).

[4] Uniform Probate Code § 2-504(a) (1975). *See* text at appendix B. (Note: Some states have enacted modified versions.)

Next the appended self proving affidavit is chosen. If the domiciliary state's "relaxed" clauses are used, the execution state's affidavit is selected, and vice versa. If neither state has "relaxed" provisions, then the domiciliary state's affidavit is appended, just as usual.

The use of both the "relaxed" method and the traditional affidavit [5] in every case it is advisable even where both the domiciliary state and the execution state recognize the relaxed method. Doing so will increase the acceptability of the will should it ever be probated in a third state which recognizes only appended affidavits.

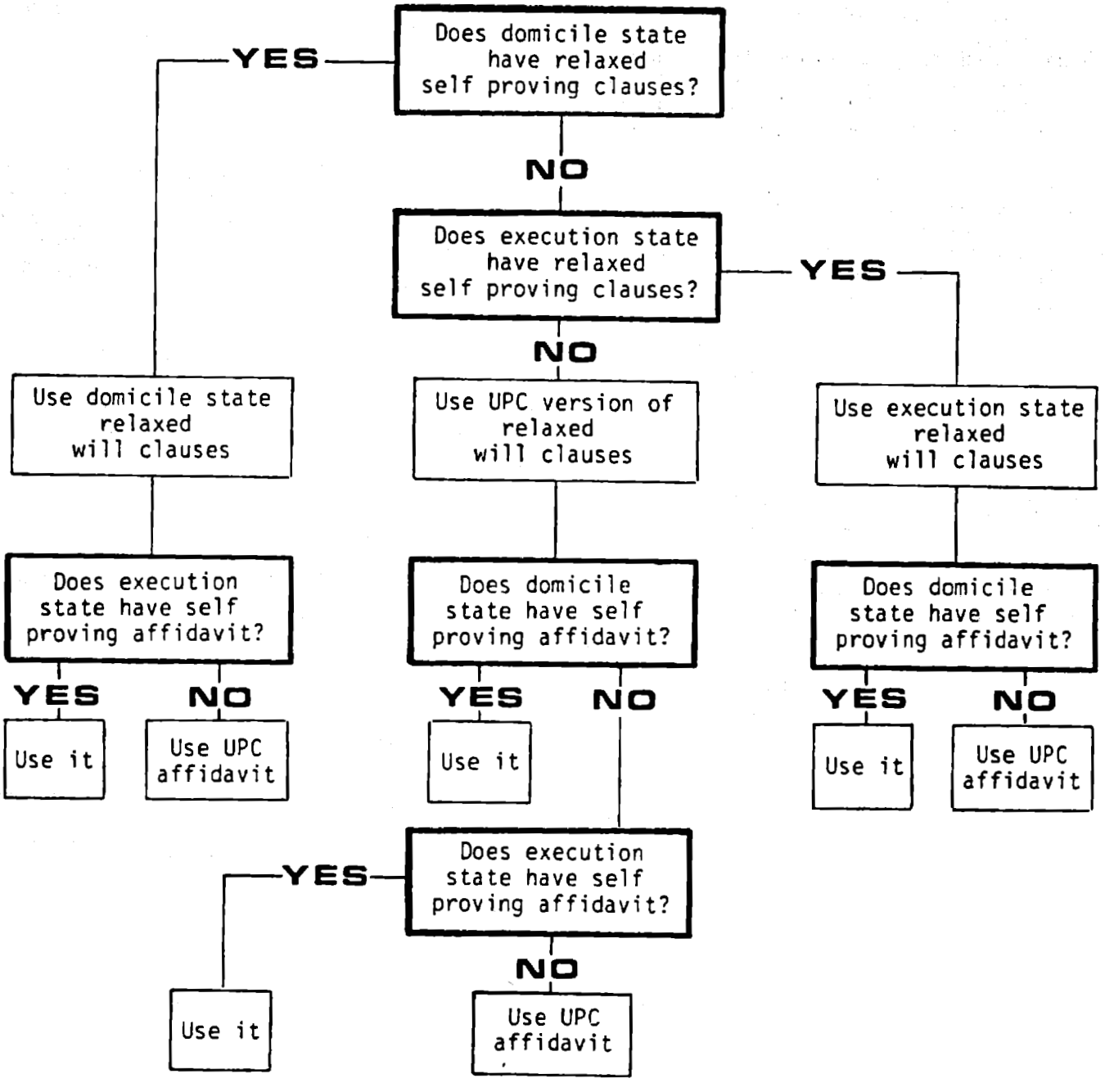
Conclusion

By using this method, legal assistance officers will be able to serve their clients better. Each will can be tailored to maximize the chances that it will be admitted to probate in any state in which it may be offered without the necessity of a live witness to prove the will.

[5] *See* Appendix C for test of typical self proving affidavit.

Appendix A

Choosing Self Proving Clauses



Appendix B

Uniform Probate Code

Section 2-504. (a) Any will may be simultaneously executed, attested, and made self-proved, by acknowledgement thereof by the testator and affidavits of the witnesses, each made before an officer authorized to administer oaths under the laws of the state where execution occurs and evidenced by the officer's certificate, under official seal, in substantially the following form:

I _____ the testator, sign my name to this instrument this _____ day of _____, 19_____, and being first duly sworn, do hereby declare to the undersigned authority that I sign and execute this instrument as my last will and that I sign it willingly (or willingly direct another to sign for me), that I execute it as my free and voluntary act for the purposes therein expressed, and that I am eighteen years of age or older, of sound mind, and under no constraint or undue influence.

_____
TESTATOR

We, _____, and _____, the witnesses, sign our names to this instrument, being first duly sworn, and do hereby declare to the undersigned authority that the testator signs and executes this instrument as his last will and that he signs it willingly (or willingly directs another to sign for him), and that he executes it as his free and voluntary act for the purposes therein expressed; and that each of us, in the presence and hearing of the testator, hereby signs this will as witness to the testator's signing, and that to the best of our knowledge the testator is eighteen years of age or older, of sound mind and under no constraint or undue influence.

_____
WITNESS

_____
WITNESS

THE STATE OF _____
COUNTY OF _____

Subscribed, sworn to and acknowledged before me by _____ the testator and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, 19_____.

(SEAL)

(Signed)

_____

_____
(Official capacity)

Appendix C

Typical Self Proving Affidavit[6]

We, _____, _____, and _____, the testator and the witness, respectively, whose names are signed to the attached or foregoing instrument, being first duly sworn, do hereby declare to the undersigned authority that the testator signed and executed the instrument as his last will and that he had signed willingly or directed another to sign for him, and that he executed it as his free and voluntary act for the purposes therein expressed; and that each of the witnesses, in the presence and hearing of the testator, signed the will as witness and that to the best of his knowledge the testator was at that time eighteen or more years of age, of sound mind and under no constraint or undue influence.

_____ _____ _____

TESTATOR WITNESS WITNESS

Subscribed, sworn to and acknowledged before me by _____ the testator, and subscribed and sworn to before me by _____ and _____, witnesses, this _____ day of _____, 19_____.

(SEAL)

_____

(Signed)

_____

(Official capacity)

[6] Hawaii Rev. Stat. § 560:2-504 (1984 Supp.)

New TJAG and TAJAG Appointed

Major General Hugh R. Overholt
The Judge Advocate General

On 1 August 1985, Major General Overholt was appointed the 32nd Judge Advocate General of the Army.

General Overholt was born in Beebe, Arkansas. He was awarded a Bachelor of Arts degree and his law degree from the University of Arkansas where he served on the Editorial Board of the Law Review. Upon completion of his law studies, he received a direct appointment as a first lieutenant in the Judge Advocate General's Corps. General Overholt's military schooling includes the JAGC Basic and Advanced Courses, Airborne School, Command and General Staff College, and the Industrial College of the Armed Forces.

General Overholt has served in a variety of assignments. He was an Assistant Staff Judge Advocate at the United States Army Field Artillery Training Center, Fort Chaffee, Arkansas; at the United States Army Aviation Center, Fort Rucker, Alabama; at Seventh United States Army Support Command, Europe; and Deputy Staff Judge Advocate, 101st Airborne Division, Fort Campbell, Kentucky. He was the Staff Judge Advocate of the 7th Infantry Division in Korea; and served as Chief of the Military Justice Division, Director of the Academic Department, and then as Chief of the Criminal Law Division of The Judge Advocate General's School, Charlottesville, Virginia. In the Office of The Judge Advocate General, Headquarters, Department of the Army, Washington, D.C., he served as Chief of the Personnel, Plans and Training Office. As a colonel, General Overholt served as Staff Judge Advocate, XVIII Airborne Corps and Fort Bragg, Fort Bragg, North Carolina; and as Special Assistant for Legal and Selected Policy Matters, Office of the Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics), Washington, D.C. Following his promotion to brigadier general, General Overholt served as Assistant Judge Advocate General for Military Law. His most recent assignment has been as The Assistant Judge Advocate General.

General Overholt has been awarded the Legion of Merit, the Defense Meritorious Service Medal, the Meritorious Service Medal (with Oak Leaf Cluster), and the Army Commendation Medal (with two Oak Leaf Clusters).

He is married to the former Laura Annell (Ann) Arnold. They have two children: Sharon Lea and Hugh Scott.

Major General William K. Suter
The Assistant Judge Advocate General

General Suter was born in Portsmouth, Ohio, raised in Kentucky, and attended Kentucky's Millersburg Military Institute. He later attended Trinity University in San Antonio, Texas, and upon graduation, was commissioned through the Army's ROTC program. Thereafter, General Suter attended the Tulane School of Law in New Orleans, Louisiana, and received his law degree in 1962. As a law student, General Suter served on the Tulane Law Review Board of Editors and was elected to the Order of the Coif.

General Suter's many assignments have taken him to places as diverse as Alaska, Thailand, and Vietnam. He has served as defense counsel and prosecutor, as well as an instructor at The Judge Advocate General's School. He has been an Assistant Staff Judge Advocate with the United States Army Alaska; Staff Judge Advocate of U.S. Army Support, Thailand; Chief of Civil Law and then Deputy Staff Judge Advocate, USARV, Vietnam; Staff Judge Advocate of the 101st Airborne Division (Air Assault), Fort Campbell, Kentucky; and Chief of Personnel, Plans and Training Office, Office of The Judge Advocate General. He has attended the Armor School, both the Basic and Graduate levels of training at The Judge Advocate General's School, Airborne School, Command and General Staff College, and the Industrial College of the Armed Forces. From 1981 through 1984, General Suter served as Commandant of The Judge Advocate General's School in Charlottesville, Virginia. His most recent assignment was Commander, United States Army Legal Service Agency, and Chief Judge, United States Army Court of Military Review.

General Suter is a member of the American and Federal Bar Associations and the Louisiana Bar Association.

General Suter, his wife, and two sons reside in Alexandria, Virginia. He is the son of Mr. and Mrs. W. C. Suter of Tampa, Florida.

The Advocacy Section

Trial Counsel Forum

Trial Counsel Assistance Program, USALSA

Table of Contents

Administrative Intrusions

Major Ernest F. Peluso
Trial Counsel Assistance Program, USALSA

Introduction

The brigade trial counsel is awakened by the telephone. It is one of the battalion commanders calling. A claymore anti-personnel mine has just been discovered missing from the arms room. Two enlisted soldiers who live in the barracks are suspected because they are "problem soldiers." The commander is primarily concerned with the physical safety of the soldiers, but is also worried about the theft of government property, and would like to bring the responsible parties to justice.

It is unlikely that the commander can authorize a "search"[1] in any area within the battalion where soldiers entertain an objectively reasonable expectation of privacy[2] *(i.e.,* their personal effects, wall lockers and foot lockers). There is simply no factual basis to establish probable cause to "search."[3]

The commander has one alternative: an *inspection* of the unit "or any part thereof."[4] If the mine is discovered in a wall locker during a bona file inspection it can be seized under the plain view doctrine.[5] The commander will have protected the soldiers from harm and he or she still has an excellent chance of initiating a successful prosecution.

Unless you have been stranded on a desert island or practicing law in an area unaffected by Supreme Court precedent, you are aware of the profound changes which have been imposed upon the protection and coverage of the fourth amendment of the United States Constitution.[6] The law of search and seizure is currently experiencing one of the most intense transitions in its entire history. There have been sweeping changes across the whole spectrum which affect the manner in which commanders, military judges, and magistrates[7] will determine such issues as the existence of probable cause to search,[8] the viability of an intrusion into

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[1] Mil. R. Evid. 315(b)(1) ("An authorization to search" is an express permission, written or oral, issued by competent military authority to search a person or an area for specified property or evidence).

[2] Middendorf v. Henry, 425 U.S. 25 (1976); Parker v. Levy, 417 U.S. 733 (1974); O'Callahan v. Parker, 395 U.S. 258 (1969); Burns v. Wilson, 346 U.S. 137 (1953); United States v. Stuckey, 10 M.J. 347 (C.M.A. 1981); Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976) (While the Bill of Rights applies to American service members, the protections must be conditioned upon demands of military discipline and duty). *See also* Mil. R. Evid. 314(d) for searches of government property ("obviously there are places within the unit which are exclusively government property and wherein no member would entertain a reasonable expectation of privacy").

[3] Mil. R. Evid. 315(f)(2) (Probable cause to search exists where there is a reasonable belief that the person, property, or evidence sought is located in the place or on the person to be searched). *See also* Massachusetts v. Upton, 104 S. Ct. 2085 (1985); Illinois v. Gates, 462 U.S. 213 (1983).

[4] Mil. R. Evid. 313(b); Dep't of Army, Reg. No. 210–10, Installations-Administration, para. 2–23*b* (12 Sept. 1977) (I01, 6 May 1985) [hereinafter cited as AR 210–10] (the *entire* unit or organization *need not* be inspected in order to preserve the validity of the inspection. A distinct part of a unit or small work groups of individuals within the unit may be inspected when there is a valid reason for doing so).

[5] Texas v. Brown, 460 U.S. 730 (1983); Coolidge v. New Hampshire, 403 U.S. 443 (1971). *See also* Mil. R. Evid. 316(d)(4)(C) ([property or evidence may be seized if] a person while in the course of otherwise lawful activity [inspection or inventory] observes in a reasonable fashion property or evidence that the person has *probable cause* to seize) (emphasis added).

[6] Whitebread, *The Burger Court's Courter-Revolution in Criminal Procedure,* The Army Lawyer, June 1985 at 1.

[7] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 9–7 (1 July 1984) (C1, 15 March 1985). [hereinafter cited as AR 27–10] (This provision of the regulation empowers Army judges and magistrates to authorize searches and apprehensions within their jurisdictions).

[8] Massachusetts v. Upton, 104 S. Ct. 2085 (1985); Illinois v. Gates, 462 U.S. 213 (1983); United States v. Tipton, 16 M.J. 283 (C.M.A. 1983).

family housing on post,[9] the basis for a search in the schoolyard,[10] and the applicability of the exclusionary rule[11] where the government officials are acting in "good faith."[12]

These cases have attracted a great deal of publicity due, in part, to the gravity of the decisions, as well as the august level of court from which they were issued. In the shadow of this effort a more subtle, but no less significant, modification to military practice has been evolving: the resurrection and revitalization of the inspection and inventory as effective, intrusive tools for the commander.

It is vital to understand that there is an important distinction between a search and an administrative intrusion (inspection or inventory). A search in an intrusion into an area where a soldier has an objectively reasonable expectation of privacy conducted by government officials for the purpose of obtaining *evidence* which can later be used in a *criminal prosecution.*[13] An inspection is also an intrusion into a place where a service member normally entertains an objective, reasonable expectation of privacy, but the *primary purpose* "is to determine and ensure security, military fitness or good order and discipline of the unit. . ."[14]

Admittedly, to the young soldier standing at parade rest next to his or her wall locker in silent witness to the examination of his or her personal property, the distinction between a search and an inspection may be subtle indeed. The difference is nonetheless critical, and the correct application of the appropriate standard will determine the admission or suppression of evidence or contraband discovered during the intrusion.

Theoretically, the military commander can order an inspection or inventory whenever he or she determines it is appropriate. As long as his or her "primary purpose" is to insure the health, welfare, morale, fitness and readiness of the unit, and so long as the scope[15] of the intrusion is reasonable, evidence of crime or contraband discovered as a result can be offered into evidence at courtsmartial.[16]

Inspections and inventories are not recent innovations.

> Inspections are time-honored and go back to the earliest days of the organized militia. They have been experienced by generations of Americans serving the Armed Forces. Thus, the image is familiar of a soldier standing rigidly at attention at the foot of his bunk while his commander sternly inspects him, his uniform, his locker, and all his personal and professional belongings.[17]

The efficacy of the administrative intrusion was at one time so widely accepted that challenges to its lawful implementation were exceedingly rare.[18] In 1961, the Court of Military Appeals reviewed the intrusion into the personal belongings of a young service member whom the command strongly suspected was the culprit in a transient barracks larceny. Even though the procedure focused upon the appellant from the outset, the court felt, "Clearly this search was nothing more or less than a shakedown inspection *the lawfulness of which has long been recognized.*"[19]

Although there were a few appeals involving specific administrative procedures[20] during the Vietnam war, there were no serious challenges within the military system to the entire array of administrative intrusions until *United States v. Thomas*[21] in 1976. A truly comprehensive analysis of this case would include reference to the post-Vietnam war era, the personnel turmoil affecting the Court of Military Appeals in the middle years of the 1970s, and the aggressive constitutional posture of the court's Chief Judge.[22] For our purposes it will be sufficient to recall that *Thomas* was a review of the standard health and welfare inspection of that period.

The intrusion in *Thomas* was designed by the Marine commander to determine whether contraband drugs were present within his unit. A marijuana detector dog was allowed to walk through the barracks to see if she could discern the presence of marijuana. If she did locate a possible site, the area was marked and the marine responsible

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[9] Steagald v. United States, 451 U.S. 204 (1981); Payton v. New York, 445 U.S. 573 (1980); United States v. Mitchell, 12 M.J. 265 (C.M.A. 1982); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 302(e)(2) [hereinafter cited as R.C.M.] (Unless the initial intrusion can be justified under either a consent theory [R.C.M. 302(e)(2)(A), Mil. R. Evid. 314(e), 316(d)(2)] or an exigent circumstances theory [R.C.M. 302(e)(2)(B), Mil. R. Evid. 315(g), 316(d)(4)(B)], government agents must have an authorization to apprehend [R.C.M. 302(e)(2)(C), Mil. R. Evid. 315(d), AR 27-10, para. 9-8] in order to enter a private dwelling on post to apprehend a service member).

[10] New Jersey v. T.L.O., 105 S. Ct. 733 (1985).

[11] Mil. R. Evid. 311 is the "exclusionary rule" utilized by the Armed Forces for fourth amendment violations.

[12] United States v. Leon, 104 S. Ct. 3405 (1984); United States v. Sheppard, 104 S. Ct. 3424 (1984); United States v. Postle, 20 M.J. 632 (N.M.C.M.R. 1985).

[13] United States v. Middleton, 10 M.J. 123 (C.M.A. 1981); United States v. Lange, 35 C.M.R. 458 (C.M.A. 1965); United States v. Ramirez, 50 C.M.R. 68 (N.M.C.M.R. 1974); W. Lafave, Search and Seizure § 10.3, at 253 (1978).

[14] Mil. R. Evid. 313(b).

[15] United States v. Jasper, 20 M.J. 112 (C.M.A. 1985); United States v. Brown, 12 M.J. 420 (C.M.A. 1982); United States v. King, 2 M.J. 4 (C.M.A. 1976); United States v. Eland, 17 M.J. 596 (N.M.C.M.R. 1983).

[16] Mil. R. Evid. 311 (b) and (c).

[17] United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981).

[18] United States v. Gebhart, 28 C.M.R. 172, 176 (C.M.A. 1959) ("Taking into consideration the freedom of access [which] occupants of military quarters have to all parts thereof, this generalized search has long been regarded as reasonable.").

[19] United States v. Herman, 30 C.M.R. 180, 183, (C.M.A. 1961) (emphasis added).

[20] United States v. Mossbauer, 44 C.M.R. 14 (C.M.A. 1971); United States v. Lange, 35 C.M.R. 458 (C.M.A. 1965).

[21] 1 M.J. 397 (C.M.A. 1976). Cf. Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir 1975). In *Callaway* a group of service members won a limited but Pyrrhic victory at the federal district court level. The D.C. Circuit Court of Appeals overturned the original decision and said that the warrantless drug inspections under scrutiny were both reasonable and constitutionally permissible.

[22] United States v. Thomas, 1 M.J. 397, 403 (C.M.A. 1976).

was given the opportunity to consent to a more intrusive entry. Otherwise, the behavior of the dog was described to the commander who could authorize a search if he believed there was probable cause.

Unfortunately for the military, each of the three judges on the Court of Military Appeals had a significantly different view of the law as it applied to the facts of the case. Judge Cook found the procedure to be defective because ultimately the commander did not have adequate information to establish probable cause to search. Judge Ferguson opined that the use of a detector dog was a search itself, which required probable cause before its implementation.[23] Most importantly, then-Chief Judge Fletcher advanced his personal belief that "the *abuses inherent* in any such inspection authority lead me to conclude that the fruits of inspections may not be used in a criminal or quasi-criminal proceedings *or* as basis for establishing probable cause."[24]

Chief Judge Fletcher conceded that the military command structure needed the administrative intrusion to insure good order, discipline, and general military readiness.[25] He just did not believe that the system had sufficient integrity to justify its standing as an indirect source of evidence. Therefore, he advocated that the exclusionary rule be applied to any contraband or criminal instrumentalities uncovered during one of these examinations.

Shortly after *Thomas* a slightly reconstituted[26] court decided *United States v. Roberts.*[27] Again the Fletcher court divided into three parts: Judge Perry wrote the lead opinion and officially frowned upon the Air Force "shakedown" techniques under review; Chief Judge Fletcher stood on his opinion in *Thomas;* and Judge Cook dissented.

The unhappy result for the Armed Forces was that for several years the viability of the administrative intrusion was in question. Yet, despite the precedent from the Court of Military Appeals, the various courts of military review did their very best to save the administrative procedure by either distinguishing the facts of *Thomas* and *Roberts* from their own unique military considerations,[28] or by reviewing an inspection and simply calling it something else.[29]

The dilemma which runs as a common thread throughout the modern history of administrative intrusions is that although necessary to preserve order and discipline, they are subject to abuse by commanders.[30] Even before *Thomas* or *Roberts,* it was not beyond comprehension for a commander to use an inspection[31] or an inventory[32] as a ruse or subterfuge for a search for evidence. One of the clearest examples of this practice was the case of *United States v. Mossbauer.*[33] In that case the appellant had been arrested in the civilian community for indecent exposure and possession of marijuana. When the military commander learned of the off-post incident he *immediately* inventoried the personal effects of his wayward soldier. In reviewing the evidence and testimony in the case, the Court of Military Appeals determined that one could not read the testimony of the government witnesses "without gaining the abiding impression that the entire proceedings were designed to effectuate a *search* of the accused's belongings for the purpose [of finding] marijuana."[34]

These decisions, in concert with *Thomas* and *Roberts,* gave a clear signal that the court would not allow the government to misuse administrative procedures to infringe upon the substantive, but somewhat abbreviated, fourth amendment rights[35] which all service members enjoy. In 1980, two separate events, one judicial and one executive, occurred which had a significant impact upon the viability of administrative intrusions.

On the judicial side, the personnel configuration of the Court of Military Appeals was once again in transition. The Honorable Robinson O. Everett from North Carolina was appointed Chief Judge of the court and Albert Fletcher became an associate judge. In the executive sector, the Military Rules of Evidence (Rules)[36] emerged as a revision to the Manual for Courts-Martial.[37] The rules included the "unique" 300-series which formalized for trial practice a

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[23] *Id.* at 408.

[24] *Id.* at 405 (emphasis added).

[25] *Id.* at 404.

[26] After *Thomas,* Judge Homer Ferguson retired from the court and Judge Matthew Perry was appointed by the President.

[27] 2 M.J. 31 (C.M.A. 1976).

[28] United States v. Jones, 4 M.J. 589 (C.G.C.M.R. 1977) (An inspection took place upon a Coast Guard cutter on its way back to the U.S. Because the ship was a small self contained vessel where each section was interdependent upon every other for survival, the administrative intrusion was *reasonable* in a seagoing context).

[29] United States v. Mitchell, 3 M.J. 641 (A.C.M.R. 1977) (Senior Judge Jones opined that the intrusion in question was not an inspection, but something called a "generalized search." Because the fourth amendment only prohibited *unreasonable* searches, and as he felt this one was *reasonable,* the procedure was upheld).

[30] *Thomas,* 1 M.J. at 405.

[31] United States v. Lange, 15 C.M.A. 486, 35 C.M.R. 458 (1965) (although the unit commander had a requirement from higher authority to inspect his members, he waited until a larceny had been reported and he used the administrative intrusion as a pretext to search for evidence).

[32] United States v. Mossbauer, 20 C.M.A. 584, 44 C.M.R. 14 (1971).

[33] *Id.*

[34] *Id.* at 17.

[35] See cases cited at *supra* note 2.

[36] Mil. R. Evid. 300–321 (1980)

[37] Manual for Courts-Martial, United States, 1969 (Rev. ed.).

significant portion of fourth,[38] fifth,[39] and sixth[40] amendment judicial precedent.

Rule 313 prescribed a minimum standard and specific conditions precedent under which inspections[41] and inventories[42] could be utilized as intrusive tools. If weapons or contraband were the focus of an inspection, the commander needed to have a reasonable suspicion of their presence in the unit and had *to preschedule* the intrusion.[43] These standards and conditions were designed to preclude the use of an inspection as a pretext or subterfuge for a search for evidence.

In 1981 the Everett court decided *United States v. Middleton,*[44] and thereby changed direction with regard to administrative intrusions. *Middleton* settled a number of questions which *Thomas* and *Roberts* raised and with which the various courts of military review were grappling.

Chief Judge Everett wrote that the inspection process, when applied in a reasonable fashion, was a viable means of intrusion. Evidence or contraband obtained by the commander's subordinates during the execution of an inspection could be offered into evidence at a court-martial.[45] Further, relevant information obtained during a bona-fide administrative intrusion could form the basis of a valid probable cause determination which ultimately could lead to a viable search authorization.

The *Middleton* decision did not directly interpret Rule 313(b). It was, however, accepted as potentially valid in dictum: "we do accept its [Rule 313(b)] premise that under some circumstances contraband located in the course of a military inspection may be received in evidence."[46]

Middleton also suggested that commanders were not limited to the information which could be obtained through the use of their own sensory powers.[47] Rather, the decision appeared to validate the use of detector dogs and other sense-enhancing devices[48] in the inspection process.

After *Middleton* reestablished the viability of administrative intrusions, the courts began to refocus upon another old dilemma: whether an inspection or inventory was lawful where a commander knew or suspected that evidence of crime or contraband might also be discovered. In our example of the missing claymore mine, the battalion commander certainly knows or logically should be aware that while his subordinates are inspecting the unit for the anti-personnel device they are also likely to uncover evidence of larceny.

If the materials discovered are eventually offered for admission at a court-martial, the military judge will have to resolve questions of the "mixed purposes" of the commander, establishing a system of priorities for the officer's motives. To accomplish this, the judge will scrutinize the facts and circumstances surrounding the intrusion, as well as the highly subjective testimony of the proponents.

Both the Supreme Court and the Court of Military Appeals have "blessed" inspections and inventories as a reasonable means of governmental intrusion in both the civilian[49] and military contexts.[50] The courts have long settled, and now have restated, that it is the *primary* purpose of the commander which controls whether an administrative intrusion is valid or merely a pretext for a search.[51]

In *United States v. Barnett,*[52] a battery commander at Fort Lewis, Washington, had placed the appellant in pretrial confinement while robbery and assault charges were pending. The Criminal Investigation Division (CID) had requested that, if an inventory of his property were conducted, they be permitted to observe the procedure. CPT Thomas, the battery commander, reasoned that the police were motivated by a desire to obtain more evidence for use against *Barnett* at a court-martial. However, CPT Thomas later testified that *his primary purpose* in conducting an inventory of personal effects was based upon administrative criteria (to comply with regulatory requirements[53] and local standard procedure). As a courtesy, the commander

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[38] Mil R. Evid. 311–317.

[39] Mil. R. Evid. 301–306

[40] Mil. R. Evid. 321.

[41] Mil. R. Evid. 313(b).

[42] Mil. R. Evid. 313(c).

[43] Mil. R. Evid. 313(b).

[44] 10 M.J. 123 (C.M.A. 1981).

[45] *Id.* at 129. *See also* Andresen v. Maryland, 427 U.S. 463 (1976); Coolidge v. New Hampshire, 403 U.S. 443 (1971); United States v. Sanchez, 10 M.J. 273 (C.M.A. 1981); Mil. R. Evid. 316(d)(4)(c); P. Gianelli, F. Gilligan, E. Imwinkelreid, & F. Lederer, Criminal Evidence 267 (1979).

[46] *Middleton,* 10 M.J. at 131

[47] *Id.* at 129. *See also* United States v. Place, 462 U.S. 696 (1983).

[48] United States v. Karo, 104 S. Ct. 3296 (1984) (electronic beepers); Texas v. Brown, 460 U.S. 730 (1983) (flashlights); Smith v. Maryland, 442 U.S. 735 (1979) (pen registers).

[49] United States v. Beswell, 406 U.S. 311 (1972); Wyman v. James, 400 U.S. 309 (1971); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970); United States v. Cerri, 735 F.2d 61 (7th Cir. 1985) (inspections); Illinois v. Lafayette, 462 U.S. 640 (1983); South Dakota v. Opperman, 428 U.S. 364 (1976) (civilian inventories). *See also* 14 U.S.C. § 89 (1982) (giving the U.S. Coast Guard the authority to board civilian vessels on the high seas and navigable streams and rivers to administratively examine the ship's documentation and general safety conditions)

[50] Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983) (Required urinalysis upon arrival at naval "A" school found to be reasonable even though at the time of the decision it did not fall neatly into a procedural or evidentiary category). *But see* Mil. R. Evid. 313(b).

[51] United States v. Barnett, 18 M.J. 166 (C.M.A. 1984); United States v. Law, 17 M.J. 229 (C.M.A. 1984); United States v. Kazmierczak, 37 C.M.R. 214 (C.M.A. 1967); United States v. Ramirez, 50 C.M.R. 68 (N.M.C.M.R. 1974).

[52] 18 M.J. 166 (C.M.A. 1984).

[53] Dep't of Army, Reg. No. 700–84, Logistics-Issue and Sale of Personal Clothing, para. 12–8c (15 May 1983).

granted the CID request and allowed their agents to be present and to observe the intrusion. In reviewing the actions of the battery commander, Chief Judge Everett said: "Although the evidence is sufficient to sustain the judge's finding that the commander's *primary purpose* was to secure appellant's property while he was in pretrial confinement, clearly, a *secondary purpose* was to determine if any evidence of crime was contained in Barnett's belongings."[54]

In affirming the efficacy of an administrative intrusion where the commander was motivated by *mixed* purposes, the judge opined: "The case law does *not* indicate that the results of an inventory will be inadmissible in evidence when the inventory has been performed by someone whose *secondary purpose* was to seek evidence of crime."[55]

Judge Everett's decision was based, in part, upon the reasoning found in *United States v. Law,*[56] an earlier Court of Military Appeals case.

In *Law,* the court stated that as long as administrative procedures were followed and so long as the commander's primary purpose was proper (*i.e.,* to insure health, welfare, fitness and readiness), "even some suspicion that contraband will be found will not avoid an otherwise valid [administrative intrusion]."[57]

Therefore, if the commander who initiates the inspection or inventory entertains the proper primary administrative motive for the intrusion, he or she is *not* precluded from considering any other lawful secondary purpose. The commanding officer may order an inspection because a condition exists within the unit which is inimical to health and safety of unit personnel. If the primary purpose of the intrusion is to deal with this condition, the commander need not pretend that evidence of crime or contraband will not be uncovered. On the contrary, *Law* and *Barnett* encourage responsible military leaders to be honest, ethical, and candid.

Recall the example at the beginning of the article. The commander's primary concern is the safety of his or her soldiers who are threatened by death and injury from the anti-personnel mine. He or she can order an inspection of the entire unit to locate this device and still comply with the law because his or her top priority is the physical welfare of the unit. The commander may select this administrative option despite his or her suspicion that evidence will be uncovered and despite his or her intention to exercise his or her prosecutorial options.

Standard of Proof

Normally when an administrative intrusion results in the discovery of evidence or contraband, the government can introduce the items in question over the defendant's objection[58] merely by demonstrating the administrative nature of the entry, using a preponderance of the evidence standard.[59] If it is determined that the *real* primary purpose of the intrusion was to obtain evidence, however, the parameters of Rule 313(b) will not apply and the examination will have to be justified under some other theory.[60]

In keeping with the spirit of the recent decisions, the President has ordered a modification to Rule 313(b)[61] and the Secretary of the Army has directed changes to the implementing regulations.[62] Among other things, the requirement that contraband inspections be prescheduled has been *deleted.* Commanders may now initiate an administrative intrusion whenever, in the exercise of their discretion, they determine it is necessary. Generally, evidence and contraband located as a result of these measures are subject to the aforementioned "preponderance" standard. However, the drafters of the new rule, understanding the continued potential for abuse, included an innovative subterfuge clause in the present version.

When the military judge is reviewing the propriety of an inspection[63] which was *not* previously scheduled, the focus of which is either weapons or contraband, the judge will be alert for certain facts: whether the examination occurred immediately after a report of a specific offense; whether specific individuals were selected for examination; or whether some individuals suffered substantially different intrusions. Under these circumstances, the court will require the prosecution to prove by *clear and convincing evidence* that the intrusion was an inspection within the meaning of this rule.

At first glance, the clear and convincing evidence requirement of the subterfuge clause appears to be a significant hurdle. This standard focuses upon the objective nature of evidence and is intermediate between preponderance of evidence and proof beyond a reasonable doubt.[64] The standard is

> that measure or degree of proof which will produce in the mind of the trier of fact a firm belief or conviction as to the allegation sought to be established; it is more than a preponderance of evidence, but less than that required to establish guilt beyond a reasonable doubt

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[54] 18 M.J. 166, 169 (C.M.A. 1984) (emphasis added).

[55] *Id.* at 169.

[56] 17 M. J. 229 (C.M.A. 1984)

[57] *Id* at 236.

[58] Mil. R. Evid. 311(a)(1)

[59] Mil. R. Evid. 311(e).

[60] Mil. R. Evid. 313(b)

[61] *Id.*

[62] AR 210–10, para. 2–23b.

[63] The special pretext or subterfuge clause only applies to inspections under Mil. R. Evid. 313(b). There is no similar provisions for inventories under Mil. R. Evid. 313(c).

[64] American Cyanamid Co. v. Electrical Industries, 630 F.2d. 1123, 1127 (5th Cir. 1980).

in a criminal case, and *it does not mean clear and unequivocal.* [65]

The government can *easily* meet the clear and convincing standard when the commander who orders the administrative intrusion acted reasonably and is sincerely motivated by the lawful administrative considerations. In our example, if the battalion commander takes the witness stand at the Article 39(a) session, [66] looks the judge dead in the eye, and honestly describes his or her primary purpose for the inspection of the accused's wall locker—to protect the soldiers from harm—the clear and convincing standard will be met.

Scope of Intrusion

As in any other form of lawful intrusion, the parameters of an administrative examination are subject to certain limitations, such as time and designated area. [67] The single most important element in judging the scope of an administrative intrusion, however, is the purpose. [68] In *United States v. Brown,* [69] a company commander was informed that a soldier in another company in his battalion had been injured while tinkering with pilfered small arms ammunition. As a direct result, this commander decided to hold a health and welfare inspection of his unit to preclude a similar tragedy. Captain Wright's bona fide *purpose* for the intrusion "was to insure the serviceability and the readiness of the unit, and also to look for any and all munitions, flammable materials, food in the barracks which would draw bugs, [and] illegal contraband, things of this nature." [70]

Part of the purpose of the inspection was to determine the serviceability of clothing, gear and equipment. The commander intended that uniforms and other issued clothing be scrutinized carefully. "If a uniform was in a duffel bag [the inspectors were to remove it and] go through the pockets." [71]

Obviously, the examination technique was very intrusive and the designated area and purpose were very broadly defined.

During the intrusion, a platoon leader found a packet of stolen bonds wrapped in ordinary paper in the pocket of appellant's uniform, which was properly hanging in a wall locker.

The Court of Military Appeals held that an inspection is a viable tool for commander's to use in insuring overall fitness of a unit. The procedures employed in this instance were a "classic" example of administrative examinations in terms of the commander's primary purpose and the manner of execution. Chief Judge Everett clarified the court's position that despite the reasonableness of the intrusion, there might still be areas where a soldier could continue to entertain a viable expectation of privacy and which, therefore, would be beyond the "scope" of the inspection. [72]

In this specific fact pattern it was not necessary for the officer to unwrap the paper and peruse the documents in order to satisfy the requirements of the inspection. Additionally, the court found "troublesome" the fact that these items were seized since there did not appear to be any evidence that the officer detected any indicia [73] of criminality when he examined and took possession of the bonds. In *United States v. Eland,* [74] the Navy-Marine Court of Military Review came to a similar conclusion while reviewing the scope of an inventory where a chief petty officer read the substance of the appellant's personal journal and thereby obtained evidence of several drug transactions.

However, in a very recent case, *United States v. Jasper,* [75] Judge Cox deemed the opening and reading of a letter found in appellant's off-post apartment during an inventory to be lawful. *Jasper* is a very narrow ruling which is controlled by unique circumstances. It emphasizes the fact that the reasonableness of any administrative intrusion will be judged upon the facts and conditions which exist at the time of the examination. [76] In this particular case the logical means of identifying the item and its actual owner was by reading the letter.

Reflecting back to the opening example, if the battalion commander decides, upon advice of counsel, to utilize the inspection option, he or she should feel confident in requiring even the most intrusive procedure. Logically, he or she can have his or her subordinates look into any place within the battalion where the claymore mine or some part of it might be secreted.

To further illustrate this point, suppose the missing items were an M–16 rifle and twenty rounds of ammunition. A commander could order an inspection (since the hazard to health and safety would be similar) and require that his or her staff look into any place in the unit where a culprit might hide one round of .223 calibre ammunition or the

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[65] Eaton v. Hobson, 399 F.2d. 781, 784n.2 (6th Cir. 1968) *cert. denied,* 394 U.S. 928 (1969) (emphasis added).

[66] Uniform Code of Military Justice art. 39(a), 10 U.S.C. § 839(a).

[67] United States v. King, 2 M.J. 4 (C.M.A. 1976).

[68] United States v. Brown, 12 M.J. 420 (C.M.A. 1982).

[69] *Id.*

[70] *Id.* at 421.

[71] *Id.* at 422.

[72] *Id.*

[73] Mil. R. Evid. 316(d)(4)(C) (In the military a seizure is justified under the plan view doctrine when the official observes property or evidence which he has *probable cause to seize)* (emphasis added).

[74] 17 M.J. 596 (N.M.C.M.R. 1983).

[75] 20 M.J. 112 (C.M.A. 1985).

[76] Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

smallest part of an M–16. This reasoning is logical since arguably the safest way to either hide or smuggle this weapon would be to break it down into its smallest parts and transport it in a less obvious form.

Conclusion

Commanders who bear the responsibility for maintaining our military forces in a high state of fitness and readiness have been reissued a valuable old weapon—the administrative intrusion. As with any weapon, if it is used with caution for the *purpose* it was intended, it can protect our forces and even help to make them stronger. However, if the system is abused—as some of our former jurists feared— the destructive nature of the process can wreak havoc and mayhem upon our own internal structure.

Unit commanders can employ these administrative techniques successfully, merely by honestly and candidly examining their own motivation without employing artifice or duplicity. Any experienced military attorney will recognize that in a predicament similar to the one described in the example, the vast majority of our commanders would be primarily concerned with the welfare of their troops. That is not to say that they would disregard the possibility of prosecution, but in the panoply of their considerations, a court-martial would have the least possible weight.

Navy Interprets Residual Hearsay

In the July 1985 issue of the Trial Counsel Forum, the lead article on residual hearsay,[1] noted that the Navy-Marine Court of Military Review had never directly interpreted the residual hearsay exception.[2] On 19 June 1985, this statement was no longer valid because of the Navy-Marine Court of Military Review's decision in *United States v. Yeager.*[3]

In *Yeager* the Navy-Marine court explicitly adopted and applied the four *Whalen* [4] criteria that TCAP suggested were useful in analyzing residual hearsay. The *Yeager* opinion is useful as one more example of how various facts taken together provide a sufficient foundation for the admission of residual hearsay.

In *Yeager,* the Navy-Marine court examined each of the *Whalen* criteria and carefully explained how the facts presented met the criteria. The Navy-Marine court then concluded that a witness' pretrial statement to investigative agents was properly admissible. Significantly, the *Yeager* opinion sanctioned, for the first time, the admission of an *oral, unsworn,* statement under the Military Rules of Evidence[5]. With the exception of *United States v. White,*[6] each of the earlier military cases which have construed this rule involved *written, sworn* statements.

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[1] *See,* Child, *Effective Use of Residual Hearsay, The Army Lawyer,* July 1985, at 25 n.2.

[2] Mil. R. Evid, 803 (24) and 804(b)(5).

[3] United States v. Yeager, CM84 2381 (N.M.C.M.R. 19 June 1985).

[4] United States v. Whalen, 15 M.J. 872 (A.C.M.R. 1983).

[5] Mil. R. Evid. 803(24).

[6] 17 M.J. 953 (A.F.C.M.R. 1984). *White* concerned a written statement but it was unsworn.

Qualified Use of Rape Trauma Syndrome

The Army Court of Military Review recently became the first military appellate court to consider the admissibility of "rape trauma syndrome" evidence during the merits of a rape case.[1] In *United States v. Tomlinson,*[2] the Army court concluded that the *unrestricted* use of expert testimony on rape trauma syndrome evidence violated the balancing standard of Military Rule of Evidence 403 and required reversal.

TCAP has consistently advised trial counsel to consider the use of rape trauma syndrome evidence only as a last resort, and only in rebuttal when an accused testifies that the sexual intercourse was consensual. The *Tomlinson* case reemphasizes that advice.

The Army court in *Tomlinson* was extremely concerned that an expert's testimony that a victim suffered symptoms consistent with "rape trauma syndrome" would necessarily imply that the expert concluded that the victim had been raped. The court determined that this result raised the danger of "unfair prejudice" because the expert's testimony might give "a stamp of scientific legitimacy" to a *victim's* testimony.[3] The Army court believed the unrestricted use of such testimony could lead to a "battle of experts expressing opinions on the veracity of various witnesses."[4]

The Army court made it clear, however, that the properly qualified use of rape trauma syndrome evidence was permissible. The court emphasized that where the defense raises a specific avenue of attack against the victim, then rape trauma syndrome evidence, if relevant as rebuttal to this attack, would be admissible. For example, if the defense attacked the witness' credibility on the basis that her statements about the rape were inconsistent or that there were several lapses in her memory of the event, testimony that these symptoms are commonly observed in persons suffering "emotional trauma" would be admissible.[5] Similarly, if the defense attacked on the basis of the failure of the victim to report the rape for several days, expert testimony regarding the fact that rape victims often delay reporting rape because of psychological reasons stemming from the rape would be admissible.[6]

Tomlinson emphasizes that trial counsel must be prepared to articulate a specific basis for its admission and be careful to ensure that the military judge instructs upon the limited basis for which such testimony is admitted. Additionally, *Tomlinson*

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[1] In United States v. Hammond, 17 M.J. 218 (C.M.A. 1984), the Court of Military Appeals considered the admissibility of "rape trauma syndrome" evidence during presentencing.

[2] CM 445673 (A.C.M.R. 26 July 1985).

[3] Tomlinson, slip op. at 5.

[4] *Id.*

[5] *Id.*

[6] *Id.*, slip op. at 6, *citing* People v. Bledsoe, 618 P.2d 291, 298 (Cal. 1984).

provides a caution to trial counsel not to use the term "rape trauma" because it necessarily implies that rape causes the trauma. Instead, trail counsel should ensure that the expert testimony is limited to statements which describe the physiological and psychological symptoms which are displayed by a victim of rape which are consistent with such a traumatic event.[7]

[7] *Id.*, slip op. at 4,5.

The Complainant's Credibility: Expert Testimony and Rape Trauma Syndrome

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The use of expert witnesses to evaluate another witness' credibility has been a source of continuing controversy in the legal field[1] In an early opinion, the Michigan Supreme Court noted that in a statutory rape case the defense had introduced medical experts who, based on their observations, testified that the victim "was a pathological falsifier, a nymphomaniac, and a sexual pervert."[2] The court approved of this practice stating: "We think the testimony should have been received . . . for its bearing upon the question of the weight to be accorded the testimony of the girl."[3]

Both the medical and legal fields have progressed substantially in the years since 1929. Despite the progress, the law on the use of expert testimony on credibility issues has been marked by a continuing tension between the advantages and disadvantages of using expert witnesses. Those in favor of admitting expert testimony point to the ability of such witnesses to present relevant evidence to the fact finder.[4] Those opposed to admitting expert testimony point to the tendency of the testimony to sidetrack the case on collateral issues, confuse the issues to be resolved, and invade the province of the jury.[5] Not surprisingly, court decisions on the use of expert witnesses have been inconsistent. Thus, in *United States v. Hiss,*[6] the district court held that psychiatric testimony on the mental derangement of the key prosecution witness could be admitted to impeach his credibility. A similar result was reached in several other cases which held that expert testimony could be admitted on the issue of credibility, particularly where the witness' mental condition or capacity was in question.[7]

Numerous other cases, however, have determined that expert testimony is not admissible to determine the credibility of other witnesses.[8] For example, in *United States v. Jackson,* the court summarily dismissed a claim that the defendant had been denied relevant psychiatric testimony stating: "[P]sychiatric opinions as to a witness' reliability in distinguishing truth from fantasy is inadmissible for impeachment purposes, for it invades the jury's province to make credibility determinations."[9]

During the 1960s, the California state courts issued standards which attempted to resolve these competing interests. In *People v. Russell,*[10] the California Supreme Court elaborated upon its earlier opinion in *Ballard v. Superior Court,*[11] and held that expert testimony on credibility could be admissible in certain circumstances. Russell had been accused of incest with his 14-year-old daughter. A psychiatrist examined the daughter shortly before trial and issued a report which indicated in part that "she [the daughter] is at times unable to distinguish between what occurs in reality and her own fantasies."[12] The trial judge refused to admit any psychiatric evidence as to the daughter's mental condition.[13] The California Supreme Court had held in *Ballard* that the admission of such evidence was discretionary.[14] In *Russell,* the court set forth a number of factors to guide the exercise of that discretion: the evidence

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[1] *Compare* United States v. Pacelli, 521 F.2d 135 (2d Cir. 1975); United States v. Hiss, 88 F. Supp. 559 (S.D. N.Y. 1950); People v. Borelli, 624 P.2d 900 (Col. App. 1980); State v. Tafoya, 94 N.M. 762, 617 P.2d 151 (1980); and State v. Tamm, 16 Wash. App. 603, 559 P.2d 1 (1976) (expert testimony could be admitted as to credibility) *with* United States v. Jackson, 576 F.2d 46 (5th Cir. 1978); Holliday v. State, 389 So.2d 679 (Fla. App. 1980); Jones v. State, 232 Ga. 762, 208 S.E.2d 859 (1974); People v. Williams, 6 N.Y.2d 18, 187 N.Y.S.2d 750, 159 N.E.2d 549, *cert. denied* 361 U.S. 920 (1959); and Hopkins v. State, 480 S.W.2d 212 (Tex. Crim App. 1972) (expert testimony only admissible when issue involves organic or mental disorders) *See also* United States v. Barnard, 490 F.2d 907 (9th Cir. 1973), *cert. denied,* 416 U.S. 959 (1974) (psychiatric testimony on credibility should be received only in "unusual cases."); People v. Izzo, 90 Mich. App. 727, 282 N.W.2d 10 (1979); James v. State, 546 S.W.2d 306 (Tex. Cir. App. 1977); Smith v. State, 564 P.2d 1194 (Wyo. 1977).

[2] People v. Cowles, 224 N.W. 387, 388. (Mich. 1929).

[3] *Id.* at 388.

[4] *See, e.g.,* State v. Kim, 645 P.2d 1330 (Hawaii 1982); State v. Marks, 647 P.2d 1292 (Kan. 1982); State v. Middleton, 249 Or. 427, 657 P.2d 1215 (1983).

[5] *See, e.g.,* People v. Bledsoe, 36 Cal. 3d 236, 681 P.2d 291, 203 Cal. Rptr. 450 (1984); State v. Taylor, 663 S.W.2d 235 (Mo. 1984) (en banc).

[6] 88 F. Supp. 559 (S.D.N.Y. 1950).

[7] *See* cases cited at *supra* note 1. *See also* Mosley v. Commonwealth, 420 S.W.2d 679 (Ky. 1967); Hampton v. State, 92 Wis. 2d 450, 285 N.W.2d 868 (1979).

[8] *See* cases cited at *supra* note 1.

[9] 576 F.2d 46, 49 (5th Cir. 1978).

[10] 70 Cal. Rptr. 210, 443 P.2d 794 (1968) (en banc).

[11] 64 Cal. 2d. 159, 49 Cal. Rptr. 302, 410 P.2d 838 (1966).

[12] United States v. Russell, 443 P.2d at 799.

[13] *Id.* at 798.

[14] *United States v. Ballard.*

must be related to credibility and show the effect of a particular mental or emotional condition on the witness' ability to tell the truth; the evidence must be presented in a form which insured that the knowledge which it represented could be effectively communicated to the jury and not in "arcane terms" which would not benefit a lay fact-finding body; the court should determine whether the examination upon which the testimony was based utilized techniques of general scientific acceptance and was sufficiently thorough to facilitate a reliable opinion; and the evidence should be examined with a view to preserving the integrity of the jury as the finder of facts.[15] The court emphasized that the expert's function was *not* to determine the veracity of the witness' testimony.[16] This determination was reserved for the finder of fact:

> Expert opinion is admitted in this area in order to inform the jury of the effect of a certain medical condition upon the ability of the witness to tell the truth - not in order to decide for the jury whether the witness was or was not telling the truth on a particular occasion.[17]

Other courts have also emphasized that the determination of a witness' veracity is reserved for the fact finder.[18]

Recent advances in psychiatry and psychology have added a new twist to the debate. Psychiatrists and psychologists are now able to link a witness' psychological symptoms to the occurrence of a particular event. Expert witnesses are willing to testify that, because a witness shows certain symptoms, the witness' story that a particular event occurred must be correct.[19] The identification of symptoms such as "rape trauma syndrome"[20] enables expert witnesses to form an opinion, not only as to the witness' general credibility or capability to tell the truth, but also as to the veracity of the particular testimony which is being presented in court.

Expert testimony about "rape trauma syndrome" and the use of its symptoms to infer that a rape occurred has engendered a raging controversy in the courts.[21] The Court of Military Appeals first addressed the issue of the admissibility of psychological testimony on the personality traits of the victim of an alleged rape in *United States v. Moore.*[22] In *Moore,* the defense claimed that the victim had consented to intercourse. Three psychologists testified on the government's behalf that the victim might unknowingly place herself in a sexually compromising situation and that a man meeting her might feel he was being lured into sexual activities, but that it was unlikely that if the victim consented to intercourse she would later cry rape.[23] The court upheld the admissibility of this testimony, although there was no majority opinion.[24] Judge Cook engaged in a straightforward analysis which first concluded that the three witnesses had established sufficient qualifications to be considered "experts" in the area of human personality traits and their effect on individual behavior.[25] He found the testimony "relevant" because it had a tendency to make more probable a finding that the victim had not consented.[26] Finally, he found no unfair prejudice because the evidence was not offered for an inflammatory purpose and it had substantial probative value. The testimony was *not* a representation that, "as a matter of scientific fact," the victim "must have been telling the truth."[27] Judge Cook concluded that the evidence did not cause the court members to decide the case on the basis of passion or bias.[28]

Judge Fletcher concurred in the result.[29] He noted that whenever consent is at issue in a sexual offense, the victim's reasonable manifestations of resistance should be evaluated. Judge Fletcher found that portions of the expert testimony could assist the court in determining when the victim "became aware of her plight," and thus, the reasonableness of her efforts at resistance.[30] He also found that other parts of the testimony might explain an apparent lack of resistance.

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[15] *United States v. Russell.*

[16] *Id.* at 802.

[17] *Id.*

[18] *See, e.g.,* United States v. Adkins, 5 C.M.A. 492, 498-99, 18 C.M.R. 116, 122-23 (1955); *People v. Izzo;* People v. Parks, 41 N.Y.2d 361, 390 N.Y.S.2d 848, 359 N.E.2d 358 (1976); *cf.* Olson v. Ela, 8 Mass. App. 165, 392 N.E.2d 1057, 1060 (1979) ("no witness can give an opinion as to the honesty of another witness' testimony").

[19] *See generally* Goldstein, *Credibility and Incredibility: The Psychiatric Examination of the Complaining Witness,* 137 Am J. Psych. 1283 (1974); Comment, *The Pyschologist as Expert Witness: Science in the Courtroom,* 38 Md. L. Rev. 539 (1979).

[20] "Rape trauma syndrome" is a term used to describe the recurring pattern of post-rape symptoms. *See* Burgess & Holmstorm, *Rape Trauma Syndrome,* 131 Am. J. Psych. 981 (1974). Other such "syndromes" have also been identified. *See, e.g.,* Ibn-Tamas v. United States, 455 A.2d 893 (D.C. App. 1983) ("battered woman syndrome"); State v. Loebach, 310 N.W.2d 58 (Minn. 1981) ("battering parent syndrome").

[21] *See* United States v. Hammond, 17 M.J. 218 (C.M.A. 1984). *Compare* People v. Bledsoe, 36 Cal. 3d 236, 203 Cal. Rptr. 450 681 P.2d 291 (1984); State v. Saldana, 324 N.W.2d 227 (Minn. 1982) (en banc); State v. McGee, 324 N.W.2d 232 (Minn. 1982); and State v. Taylor, 663 S.W.2d 235 (Mo. 1984) (en banc) *with* State v. McQuillen, 236 Kan. 161, 689 P.2d 822 (1984); State v. Marks, 647 P.2d 1292 (Kan. 1982); State v. Liddel, 685 P.2d 918 (Mont. 1984); State v. LeBrun, 587 P.2d 1044 (Ore. 1978); *cf.* State v. Kim 645 P.2d 1330 (Hawaii 1982); State v. Middleton, 294 Or. 427, 657 P.2d 1215 (1983) (expert testimony regarding sexual abuse of children).

[22] 15 M.J. 354 (C.M.A. 1983). *See also* United States v. Fields, 3 M.J. 27 (C.M.A. 1977); United States v. Smith, 14 M.J. 845 (A.C.M.R. 1982); *cf.* United States v. Hammond, 17 M.J. 218 (C.M.A. 1984).

[23] *Moore* at 360.

[24] *Id.* at 365.

[25] *Id.* at 361.

[26] *Id.* at 363.

[27] *Id.* at 364-65.

[28] *Id.* at 365.

[29] *Id.* at 365-66.

[30] *Id.* at 366.

Finally, although portions of the testimony indirectly reflected opinions on the veracity of the victim, Judge Fletcher determined this was a proper subject for expert testimony.[31]

Chief Judge Everett dissented.[32] He acknowledged that there had been an increased judicial receptivity to psychological testimony in recent years.[33] but argued that the methodology presented in this case had not been based on principles which were "sufficiently established to have gained general acceptance in the particular field in which it belongs."[34] He also found much of the testimony irrelevant, as it only explained *why* the victim might consent to or acquiesce in intercourse, rather than *whether* she did in fact consent. Moreover, while one of the experts testified that the victim's symptoms were consistent with an assault by a "power rapist," they were equally consistent with consensual intercourse. In light of these factors, Chief Judge Everett concluded that the expert testimony created a substantial danger of undue prejudice, confusion of the issues, and of misleading the jury.[35]

In *United States v. Hammond,*[36] the Court of Military Appeals held that evidence of rape trauma syndrome was admissible during sentencing proceedings after a finding of guilty of rape. The majority opinion noted that such evidence could help the members understand the psychological damage caused by a rape and therefore, could be helpful in adjudging a sentence. *Hammond* is in accord with decisions from other courts which have recognized that a rape victim may show psychological symptoms.[37]

The admissibility of "rape trauma syndrome" testimony to prove that a rape occurred, however, presents a fundamentally different issue than its admissibility in sentencing proceedings. While one may conclude that rape might cause certain psychological symptoms, it does not necessarily follow that the observance of those symptoms means that a rape has actually occurred. "Rape trauma syndrome" testimony should not be admitted on the merits of a court-martial before the rape has been proven. It is a logical fallacy to assume that simply because one knows that factor "A" may cause result "B," and one can now observe result "B," that "B" was caused by "A."[38] There is presently no general consensus in the legal or medical professions that a certain set of symptoms points conclusively to rape. The characteristic symptoms are not present in all rape cases, and may be present after any number of traumatic events. Those courts which have excluded evidence of rape trauma syndrome have been especially concerned with the danger that the court members will be confused by the expert testimony and engage in the logical fallacy outlined above.[39] Thus, in a recent state case, the Minnesota Supreme Court noted:

> Rape trauma syndrome is not the type of scientific test that accurately and reliably determines whether a rape has occurred. The characteristic symptoms may follow *any* psychologically traumatic event. . . . Permitting a person in the role of an expert to suggest that because the complainant exhibits some of the symptoms of rape trauma syndrome, the complainant was therefore raped, unfairly prejudices the appellant in creating an aura of special reliability and trustworthiness. Since jurors of ordinary abilities are competent to consider the evidence and determine whether the alleged crime occurred, the danger of unfair prejudice outweighs any probative value.[40]

An excellent recognition of the possible use and misuse of testimony relating to "rape trauma syndrome" is found in *State v. Taylor.*[41] The complainant had been working as a bartender with Taylor, a fellow employee. She stated that after the customers had left on her first workday, Taylor knocked her to the floor and raped her. Afterwards, he called a cab for the complainant which she took home. Upon her arrival, the complainant called the police, who went to the bar and found Taylor calmly sipping a beer. At trial Taylor defended on a theory that the complainant consented to intercourse.[42]

A psychiatrist specializing in the diagnosis and treatment of rape victims testified that he examined the complainant about three months after the incident. Based upon her verbal and nonverbal responses during the examination he concluded that the complainant was suffering from "rape trauma syndrome." He also gave his opinion that the victim was not "fantasizing." He concluded that she would not be faking the symptoms, and that he could see no reason why consensual intercourse would cause such symptoms.[43]

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[31] *Id.* at 367.

[32] *Id.*

[33] *Id.* at 372.

[34] *Id.* at 372 (quoting Frye v. United States, 54 App. D.C. 46, 293 F. 1013, 1014 (1923)).

[35] *Id.* at 375.

[36] 17 M.J. 218 (C.M.A. 1984).

[37] *See, e.g.,* Redmond v. Baxley, 475 F. Supp. 1111 (E.D. Mich. 1979) (rape trauma syndrome admissible in civil case); Division of Corrections v. Wynn, 438 So. 2d 446 (Fla. Dist. Ct. App. 1983) (same); Alphonso v. Charity Hospital of Louisiana, 413 So. 2d 982 (La. Ct. App. 1982) (same); White v. Violent Crimes Compensation Board, 76 N.J. 368 (1978) (individual may be compensated for effects of rape trauma syndrome); *In re Pittsburgh Action Against Rape,* 494 Pa. 15, 428 A.2d 126, 138–40 (1981) (Larsen, J., dissenting) (discussing issue).

[38] *See* United States v. Moore, 15 M.J. 354, 375 (C.M.A. 1983) (Everett, C.J., dissenting); State v. Maule, 35 Wash. App. 287, 667 P.2d 96, 100 (Wash. App. Ct. 1983).

[39] *See, e.g.,* State v. Saldana, 324 N.W.2d 227 (Minn. 1982); State v. McGee, 324 N.W.2d 232 (Minn. 1982).

[40] *Saldana,* 324 N.W.2d at 229–30; *contra,* State v. Marks, *See also State v. Maule.*

[41] 663 S.W.2d 235 (Mo. 1984).

[42] *Id.* at 236.

[43] *Id.* at 237.

The court held that the admission of this testimony was prejudicially erroneous.[44] The court recognized that the expert was eminently qualified to treat victims of sexual assault and that "rape trauma syndrome" was a common reaction among such assault victims.[45] A conclusion that the complainant was suffering from "rape trauma syndrome," and that the syndrome resulted from her rape in the bar, however, went beyond the proper scope of expert testimony. The court noted the inherent prejudice in the use of the term "rape trauma syndrome" stating:

> There are inherent implications from the use of the term "rape trauma syndrome," for it suggests that the syndrome may only be caused by "rape". . . . [Rape] trauma syndrome could result from a number of stressful situations, and it would be too presumptuous for [the expert] to designate the particular experience. That was not his proper function.[46]

Indeed, the court noted that the scope of the expert's opinion must necessarily be more limited:

> Under the qualifications given the most that Dr. Amanal could legitimately state would be that the prosecution symptoms were consistent with a traumatic experience — even a stressful sexual experience. But it goes beyond his qualifications to say that she was raped by defendant at Mary's Moonlight Lounge. That is indeed a chasm too wide and deep to leap.[47]

The court concluded that the introduction of expert testimony on "rape trauma syndrome" was both misleading and confusing to the trier of fact:

> There is a risk that the jury will regard the expert's opinion that a victim suffers from rape trauma syndrome as dispositive on the issue of consent. The term itself connotes rape . . . and a hazard exists from "the misleading aura of certainty" that surrounds scientific evidence. There is also danger that the expert testimony will divert the jury's attention from the real issue and cause confusion with numerous collateral issues.[48]

These dangers outweighed the limited utility of such testimony and the court therefore rejected its use.

A similar analysis is found in *People v. Bledsoe.*[49] In *Bledsoe,* a counselor who had experience consulting with rape victims described the general manifestations of "rape trauma syndrome," listed the symptoms she recognized in the complainant, and then gave her expert opinion that the complainant suffered from rape trauma syndrome.[50] In rejecting this testimony, the California Supreme Court noted that "rape trauma syndrome" had not been developed as a diagnostic device and had never been meant to be used as a device to determine the occurrence of a rape.[51] In fact, quite the opposite was true. Rape trauma syndrome was a therapeutic device which enabled counselors to determine a course of treatment. In keeping with this purpose, counselors were trained to unhesitatingly accept the complainant's version of the facts without any critical analysis or objective judgment as to the truth of the story.[52] The therapeutic goals and procedures established for counselors treating "rape trauma syndrome" therefore were incompatible with its use in a courtroom to determine the credibility of the rape victim's rendition of events or to determine whether a rape had actually occurred.[53] This combination of incompatible purposes, lack of verification, and great potential of confusion and unfair prejudice barred the use of the expert testimony.[54]

The analyses in *Bledsoe* and *Taylor* provide the ammunition needed to attack the introduction of "rape trauma syndrome" testimony on a number of fronts. "Rape trauma syndrome" is not recognized as a separate mental disorder, but is merely one manifestation of post-traumatic stress disorder, the proper diagnosis under the Diagnostic and Statistical Manual.[55] Counsel should therefore object vigorously to *any* use of the term "rape trauma syndrome" to describe the complainant's symptoms.[56] Moreover, while it is now recognized that a rape victim may exhibit characteristic psychological symptoms, such symptoms may also result from any number of psychologically traumatic events. There is no scientifically proven method of determining that a rape occurred merely because of the presence

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[44] *Id.* at 241.

[45] *Id.* at 241.

[46] *Id.* at 240.

[47] *Id.* at 241.

[48] *Id.* at 241–42 (citation omitted).

[49] 36 Cal. 3d 236, 681 P.2d 291 (1984).

[50] 681 P.2d at 294–95.

[51] *Id.* at 301.

[52] *Id.* at 300. The court noted that no studies existed to show what percentage of individuals who suffered from "rape trauma syndrome" had in fact been raped. Instead, all the studies which had been undertaken relied unquestioningly on the truth of the victims' story. Moreover, studies in the area indicated that even those individuals who did claim to be raped did not invariably show symptoms of "rape trauma syndrome" and a significant number of such alleged victims showed no symptoms.

[53] *Id.* at 298. The court did not slam the door on such testimony in all cases, however. In certain cases expert testimony might be probative of issues other than existence or non-existence of rape, *e.g.*, to explain apparently inconsistent actions after the incident occurred. The *Bledsoe* court noted that expert testimony might help clear up commonly held misconceptions about the reactions of rape victims in such circumstances. *See also* United States v. Hammond, *supra.*

[54] The decision was based upon a combination of lack of proper relevance, failure to meet the validity standards of Frye v. United States, 293 F. 1013 (D.C. Cir. 1923), and the potential for confusion of the issues.

[55] American Psychiatric Association, *Diagnostic and Statistic Manual of Mental Disorders* para. 236 (1980).

[56] *See Taylor,* 663 S.W.2d at 240.

or absence of such symptoms.[57] Thus, the admission of expert testimony on "rape trauma syndrome" as direct evidence that a rape occurred is improper.

Counsel may also be able to argue that the testimony is not probative of any fact in dispute. Even if the "rape trauma syndrome" testimony is admitted, the expert should be limited to making a diagnosis of "post-traumatic stress disorder," and concluding that the person examined might have undergone a psychologically traumatic event.[58] In some cases, the only possible traumatic event which the alleged victim could have undergone is a sexual assault, and consent may be the only issue. In these cases, expert testimony might arguably be sufficiently relevant to be admissible. If the defense theory of the case is not based on the victim's consent to intercourse, however, such testimony has absolutely no relevance. In addition, there may be some cases where the defense theory includes a claim that the rape complainant suffered a traumatic event other than forcible intercourse.

In one recent military case,[59] an Air Force sergeant testified that she had been raped by the accused after she invited him to her dormitory room. The evidence demonstrated that she had been a virgin before her encounter with the accused, that she had had a strict upbringing, and that she had a great fear of her parent's reaction if they discovered she had engaged in premarital sexual relations. After the accused testified on his own behalf and maintained that the complainant had consented to intercourse, the government introduced an expert who testified that the complainant exhibited symptoms consistent with rape trauma syndrome.[60] The Army Court of Military Review held that the military judge committed reversible error by overruling a defense objection to this testimony.[61] The court found that the testimony had only minimal probative value and posed a substantial danger of misleading the court members. Citing Military Rule of Evidence 403, the court found a clear danger that the court members would consider the testimony dispositive on the issue of consent and credit the victim's testimony with an unwarranted "stamp of scientific legitimacy."[62]

As the Army court recognized in *Tomlinson*, such evidence is at most probative of the existence or non-existence of a traumatic event. Where both the defense and prosecution agree that some traumatic event occurred, the expert testimony on "rape trauma syndrome" is not probative of any fact in issue.[63] Testimony that the "victim" had undergone a traumatic event would be of absolutely no use to the triers of fact in choosing between the defense and prosecution theories of the case, and expert testimony relating to "post-traumatic stress disorders" should be excluded.

Moreover, counsel may buttress the argument to exclude testimony of post-traumatic stress disorders by comparing the limited probative value of the expert evidence with the tremendous possibilities for unfair prejudice, confusion of the issues and misleading the trier of fact.[64] This is especially true when the issue involves an extremely difficult psychiatric diagnosis and the expert testimony is presented by an individual with minimal qualifications. Military prosecutors often attempt to introduce expert testimony through social workers or other lesser-trained individuals instead of psychologists, psychiatrists or other medical doctors.[65] While these individuals might meet the minimal standards required of an expert under Mil. R. Evid. 702, their lack of superior qualifications remains relevant to the probative value of their testimony. The prosecution's failure to present an expert with more than minimal qualifications can result in the exclusion of testimony.[66] Thus, even if counsel anticipates that the government will be able to qualify an individual as an "expert" under Mil. R. Evid. 702, counsel should feel free to explore and demonstrate the limits of this "expertise" to support an argument that the evidence will confuse the trier of fact.[67]

Finally, if one succeeds in excluding evidence from the government's case in chief, counsel must consider the possibility that the defense case will "open the door" to expert rebuttal testimony. Even courts which have generally excluded evidence of "rape trauma syndrome" have recognized that the disorder exists. Moreover, courts have recognized that such testimony might explain apparently incongruous acts which occurred at or after the alleged sexual assault.[68] If the defense bases its case on attacking the credibility of the complainant by showing, for example, an excessive delay in reporting the incident, the complainant's failure to escape from the accused despite opportunities to do so, or other apparently inconsistent actions, counsel

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[57] *See Bledsoe; Saldana.*

[58] *See Taylor.*

[59] United States v. Tomlinson, CM 445673 (A.C.M.R. 26 July 1985).

[60] *Id.*, slip op. at 2–3.

[61] *Id.*, slip op. at 1.

[62] *Id.*, slip op. at 5.

[63] Mil. R. Evid. 401.

[64] Mil. R. Evid. 403. *See also* United States v. Hicks, 7 M.J. 561 (A.C.M.R. 1979).

[65] Army regulations require trial counsel to make "every effort consistent with due process of law" to avoid the necessity of live testimony at a court-martial from medical, dental and veterinary officers. Dep't of Army, Reg. No. 27–10, Legal Services-Military Justice, para. 7–3 (1 July 1984).

[66] *See e.g.*, United States v. Crossley, 713 F.2d 1066, 1076 (5th Cir. 1983) (Trial court properly excluded "expert" testimony from veteran's counselor that veteran suffered from post-traumatic stress disorder despite the fact that the counselor had a master's degree in social work. The appellate court noted the difficulty inherent in diagnosing such a disorder); Comment, *The Psychologist as Expert Witness: Science in the Courtroom*, 38 Md. L. Rev. 539 (1979) (noting the wide variations in diagnoses which can result among psychiatrists and psychologists when presented with the same patients and identical symptoms).

[67] Mil. R. Evid. 403. This does not have to be done in open court. Since the admissibility of evidence is a question of law to be decided by the military judge, counsel may request an Article 39(a) session to present evidence before the military judge rules. *See* Mil. R. Evid. 103(c); Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801(e)(1).

[68] *E.g., People v. Bledsoe.*

should recognize that the government will have an additional opportunity to introduce its expert testimony on rebuttal.[69]

Conclusion

The exact legal standard for the introduction of expert testimony under the Military Rules of Evidence remains unsettled.[70] What has become clear, however, is that the military judge is afforded wide discretion in his or her rulings on the admissibility of such testimony.[71] Judicial discretion does not invariably lead to the admissibility of evidence. It may also be used to exclude similar or even identical evidence, based on the facts and circumstances of each case.[72] Defense counsel who can marshal the facts in their case and show the unreasonableness of the use of the proferred expert testimony in light of the issues to be decided will lay the groundwork for the exclusion of such evidence at trial or contribute to a successful appeal for the client.

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[69] *Id. See also* Ross, *The Overlooked Expert in Rape Prosecutions*, 14 U. Tol. L. Rev. 707 (1983).

[70] *Compare* United States v. Snipes, 18 M.J. 174 (C.M.A. 1984) (the Military Rules of Evidence are "intended to broaden the admissibility of expert testimony") *with* United States v. Bothwell, 17 M.J. 684 (A.C.M.R. 1983) (reasserting the test in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923) of general acceptance in the particular field, as essential for limiting admissibility beyond the Military Rules of Evidence).

[71] *United States v. Snipes*; United States v. Wright, 20 M.J. 518 (A.C.M.R. 1985).

[72] *Compare United States v. Snipes* and *United States v. Moore* with *United States v. Crossley.*

Administrative Law Notes

Administrative & Civil Law Division, TJAGSA

Labor Law Note

In *Cornelius v. Nutt,* 53 U.S.L.W. 4837 (U.S. 24 June 1985), the Supreme Court held that arbitrators must apply the same harmful error test as the Merit Systems Protection Board (MSPB) in deciding adverse action cases. In a 6-to-2 decision written by Justice Blackmun, the Court reversed the Federal Circuit's *Devine v Nutt,* 718 F.2d 1048 (Fed. Cir. 1983) which had held that arbitrators could properly consider the panoply of negotiated union rights in determining whether procedural error by the agency was in fact harmful. The majority of the Supreme Court ruled that the grievant must show substantial harm or prejudice to his individual rights resulting from the procedural error, 5 U.S.C. § 7701(c)(2)(A)(1982).

Two General Services Administration (GSA) employees were removed for a number of reasons. In initial interrogations about the offenses and in subsequent interviews in which they admitted their wrongdoing in sworn affidavits, neither employee was advised of his right to the presence of a union representative; further, they did not receive notices of proposed removal until almost three months after their misconduct. Both omissions were contrary to the collective bargaining agreement. While finding that the grievants committed the misconduct for which they were disciplined, the arbitrator found a "pervasive failure" by GSA to accord due process. Although this failure did not prejudice the individual grievants, the arbitrator found the removals were not for just cause as the agency did not honor important negotiated rights. She mitigated the penalties to two weeks' suspension without pay.

The Federal Circuit Court of Appeals recognized that the employees were not prejudiced, but affirmed in substantial part. In so doing, it reasoned that the violations of procedural rights important to the union were tantamount to harmful error to the union under section 7701(c)(2)(A). Moreover, the court found that the penalty reduction was appropriate to penalize the agency.

The Supreme Court disagreed, holding that a grievant must show substantial prejudice to his individual rights, consistent with the MSPB interpretation of "harmful error." Applying a different definition in the arbitral context and permitting the result below would only frustrate the Civil Service Reform Act's purposes of promoting consistency and avoiding forum shopping, said the Court. Additionally, the Court held that the board's stricter harmful error test must be applied by arbitrators to insure effective, efficient government as contemplated by the Act, and to promote expeditious discipline, consistent with section 7701. Nor did the instant interpretation of harmful error in any way undermine unions and collective bargaining. The Court stated that unions could remedy any perceived problems through collective bargaining and the unfair labor practice process. Because unions have adequate remedies of their own, the Court found it unnecessary to use the broad interpretation of harmful error applied below to fashion relief.

Labor counselors now have substantial authority for resolving cases favorably at the arbitration hearing. While many management actions contain some procedural flaws, only errors resulting in palpable harm to grievants should result in remedial action. Obviously, commanders and their staffs must be advised to adhere strictly to the terms of existing collective bargaining agreements. Now, however, the occasional mistake in processing an adverse action, which arguably has some indirect effect on the union but does not prejudice the employee, cannot be the basis for relief. Therefore, more expeditious processing of routine actions should result (no more redoing actions because of strictly procedural, nonprejudicial errors), leaving more time for meaningful, substantive effort.

Criminal Law Notes

Criminal Law Division, OTJAG

Waiver/Withdrawal of Appellate Review

P 052035Z Jul 85
FM DA WASH DC/ /DAJA–CL//
UNCLAS

For SJA/JA/TDS/Mil Judge/Legal Counsel
Subj: Procedures for Waiver/Withdrawal of Appellate Review

A. Art. 62, UCMJ.
B. RCM 1110, MCM 1984.
C. RCM 1111, MCM 1984.
D. PARA 13–5, AR 27–10.

1. Initial experience with new provisions relating to waiver/withdrawal of appellate review under refs A and B reveals several administrative problems.

2. A. Several records of trial have been received at USALSA containing waivers of appellate review dated prior to initial action, usually dated the day of the trial.

B. RCM 1110(f)(1) states that "the accused may file a waiver of appellate review only within 10 days after the accused or defense counsel is served with a copy of the action . . . ." Since the accused will often not be directly available to the trial defense counsel after service of the action, there is no impropriety in having an accused sign the waiver prior to action with the understanding that the final decision to file will not be made until after the action is served on counsel. However, the defense counsel should not "file" the waiver until after service of the action.

C. The legislative history of Art. 62 indicates that decisions regarding waiver of appellate review should not be made until after the action is served. In cases where the waiver is signed before action, the defense counsel should consult with the accused after action to reconfirm the accused's desire to waive. If necessary, an extension of the filing deadline may be requested.

D. SJA's receiving waivers before action should return them to the defense counsel without action. SJA's receiving predated waivers after action should return them to the defense counsel with a request for a written statement that the decision to waive was made after receipt of the action. The date of receipt of a properly filed waiver must be documented. In cases where the SJA is not satisfied that the waiver substantially complies with provisions of ref B, the case should be forwarded for review UP ref C.

3. In some cases, waivers or withdrawals have been recorded on the wrong form. DD Form 2330 is used for waiver or withdrawal of appellate review by ACMR or USCMA. DD Form 2331 is used for waiver or withdrawal of examination UP Art. 69(a).

4. When executing either DD Form 2330 or 2331, inapplicable provisions in parentheses should be lined through. In particular, the distinction between waiver and withdrawal must be recognized. A waiver must be filed with the convening authority (SJA) within 10 days of service of the action, plus extension, if any. After that, the waiver is characterized as a withdrawal and is filed with the clerk of court, US Army Judiciary, UP ref D.

Post-Trial Processing Problems

P 211332Z Jun 85
FM DA WASH DC //DAJA–CL//
UNCLAS

For SJA/JA/TDS/Mil Judge/Legal Counsel
Subj: Post-Trial Processing Problem Areas

1. In US v. Gilpin, CM 446290 (ACMR 29 May 1985), the accused evinced dissatisfaction with his trial DC on the Appellate Defense Counsel Representation Form. The SJA post-trial recommendation was, however, served on the same DC. ACMR held this to be error. SJA's should screen the record of trial and allied papers for such matters and, when appropriate, seek appointment of substitute DC for post-trial representation.

2. In US v. Matthews, CM 446569 (ACMR 28 May 1985), the trial DC had left active duty before post-trial processing was begun, and substitute DC was appointed for post-trial representation. Substitute DC did not contact the accused. ACMR required a new recommendation and action. In this situation, SJA's should ensure that substitute DC has compiled with the provisions of R.C.M. 1106(f)(2).

3. A few Records of Trial received at USALSA show the promulgating order stamped with a "legally sufficient" stamp dated prior to the review under R.C.M. 1112. Since the R.C.M. 1112 review determines the legal sufficiency of the trial, it is inappropriate to certify the order as legally sufficient prior to such a review.

Legal Assistance Items

Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA

Update On FTC Three-Day Cooling-Off Period Violations

The National Consumer Law Center, in its Deceptive Practices and Warranties (May/June 1985 Edition), highlighted several areas in which the Federal Trade Commission's (FTC's) Cooling-Off Period for Door-to-Door Sales Rule (16 C.F.R. § 429) is commonly violated.

This rule is important for legal assistance attorneys because it has been incorporated as part of Army Regulation 210–7, Commercial Solicitation on Army Installations. It also commonly works in tandem with similar state law statutes.

While many door-to-door sellers comply with the FTC rule's basic requirements, many sellers may neglect other less well known requirements. The FTC rule requires door-to-door sellers to:

1. Provide the consumer with a fully completed copy of the sales contract containing a statement of the buyer's right to cancel;

2. Attach to that contract an easily detachable written notice of cancellation;

3. Orally inform the consumer of his or her cancellation rights at the time the contract is signed; and

4. Draft the contract and the notice of the cancellation in the same language (*e.g.*, Spanish) as the oral sales presentation.

Door-to-door sellers thus violate the FTC rule when they include the required notice of cancellation near the buyer's signature on the contract, but fail to provide a second detachable notice. Similarly, door-to-door sellers may fail to orally inform the consumer at the time the contract is signed of his or her cancellation rights. For example, the seller in *Eastern Roofing & Aluminum Co. v. Brock*, 320 S.E.2d 22 (N.C. Ct. App. 1984) failed to comply with both requirements and was held liable for unfair and deceptive practices damages.

As indicated above, because the FTC rule often works in tandem with equivalent state statutes, legal assistance attorneys should also be alert to violations of state cooling-off period statutes. Every state but New Mexico has such a statute, and while some of these simply reiterate the FTC rule, others set out additional requirements. Sellers must comply with both the FTC rule and the state law requirements except where state law is directly inconsistent with the FTC rule. Sellers may thus have to give two different cancellation notices—one mandated by the FTC rule and one by state law requirements.

Another source of consumer cancellation rights is the Truth-In-Lending Act's rescission requirement when a creditor takes a security interest in the debtor's home. Where the Truth-In-Lending right to rescission applies, the FTC rule is pre-empted. *See* 16 C.F.R. § 429.1 n. 1(a)(2).

An additional aspect of the FTC rule is that a sale does not have to take place in the consumer's home to be covered by the rule. The rule states that the sale must take place at some place other than the seller's place of business. For example, if a salesperson confronts a consumer at the consumer's place of business, or in another seller's store, the transaction is covered by the FTC rule. Sales presentations in rented hotel rooms and public halls are also covered. In addition, while the FTC rule explicitly excludes telephone solicitations, eight states' cooling-off legislation or judicial interpretations do apply to telephone sales. *See* Alaska Stat. § 45.02.350; Ark. Stat. Ann. § 70–915; Fla. Stat. Ann. 501.021(2); La. Rev. Stat. Ann. § 9:3516(18); Mich. Comp. Laws § 455.111(a); Mont. Code Ann. § 30–14–502(2); *Brown v. Martinelli*, 419 N.E.2d 1081 (Ohio 1981); Wis. Stat. Ann. § 423.201.

A final misconception is that the consumer is liable under *quantum meruit* for the cost of services performed before the consumer cancels. In non-emergency situations, the seller bears the full risk of cancellation if it elects to perform before the three-day-cooling-off period has expired. If the buyer properly exercises his or her cancellation right, the buyer does not have to pay a penalty and is not liable for *quantum meruit* damages on the basis of services already performed. *See* the Statement of Basis and Purpose for the FTC rule in the preamble to the regulation published at 37 Fed. Reg. 22,947 (Oct. 26, 1972).

Thus, if a contractor immediately makes improvements to a house and the consumer later properly cancels, the consumer owes nothing for the services provided, although the contractor can take back any materials supplied. Where the materials are already attached to the house, the legal assistance attorney should argue that these should only be removed if the contractor can provide adequate assurance that the house will be returned to its original condition. Consumer attorneys should also note that state decisions interpreting state cooling-off statutes are not always as protective as the FTC rule in this regard.

Mobile Home Sales Fraud

Legal assistance officers should be aware of and publicize as part of a pro-active or preventive law program what may be an industry-wide scheme of overcharging service members and veterans for mobile homes. The Vietnam Veterans of America, Inc., has filed a class action law suit on behalf of all veterans, service members and others who have been victimized by this scheme.

The Veterans Administration (VA) administers a loan guaranty program to assist veterans in purchasing mobile homes by guaranteeing the lesser of fifty percent of the loan amount or $20,000. The VA is responsible for ensuring that the veteran pay a reasonable amount for the mobile home.

To perform this supervisory function, the VA requires manufacturers to certify their wholesale invoice price to the retailer, and restricts the retail purchase price under the VA loan guarantee program to 120% of that certified wholesale price.

The mobile home industry has allegedly been defrauding veterans through the following scheme. Retailers obtained a certified wholesale invoice price from the manufacturer which reflected a fraudulent-inflated cost. The retailer then sold the mobile home for up to 120% of the inflated invoice price, and provided a portion of the illegal overcharge to the manufacturer as a kickback. It is estimated that more than 20,000 service members and veterans have paid an average of $5,000 each in additional principal and interest charges upon the sale and financing of a mobile home. The fraudulent scheme additionally caused many veterans to default on their payments, which eventually cost the VA substantial amounts as guarantors of these loans.

This fradulent scheme is alleged to have been in existence for at least the past eight years. Many of the named defendants in the civil action have already pleaded guilty to federal criminal charges for making false statements and certificates. The named defendants are sued both individually and as a class representing other manufacturers and financial institutions which participated in similar schemes. The class of plaintiffs includes both veterans and active duty service members. Persons who desire more information about the suit or who may have helpful information concerning the suit should contact the attorney for the plaintiffs, Daniel F. Hayes of Smiley, Olson, Gilman & Pangia, 1815 H. Street, N.W., Washington, D.C. 20006–3604, telephone (202) 466–5100.

Education Department Debt Collection Act Address Listed

Legal assistance attorneys worldwide are continuing to see military clients who have been notified that their pay is subject to salary offset under the Debt Collection Act of 1982. Under the provisions of this act, Congress authorized federal agencies to automatically deduct up to fifteen percent each month from the pay of federal employees, including military members, who owe the government monies on certain defaulted obligations.

Many of the clients being seen are alleged to have defaulted on school loans from either the Department of Education or the Veterans Administration.

Under the Act, soldiers who are alleged to owe such obligations have the right to either negotiate a repayment plan with the agency to whom the debt is owed or to request a hearing to determine the validity of the debt.

The Department of Education recently advised that those who have questions concerning a debt owed to that agency should write to the following address:

Department of Education
ROB–3
Room 3661
400 Maryland Avenue, SW
Washington DC 20202

Although legal assistance attorneys are precluded by Army Regulation 27–3 from representing clients against whom the government is an interested or adverse party, it would be within the scope of representation on behalf of a client to represent the client short or actual administrative hearing. This would include advising the client as to the applicable law concerning the Debt Collection Act and the client's rights and remedies, and negotiating with the government agency to whom the debt is allegedly owed.

VA Educational Assistance Overpayments

A case decided in late January 1985 by the U.S. District Court for the Western District of North Carolina is of interest to legal assistance attorneys. The case involved a veteran who received monthly advance educational assistance payments for college courses and who failed the courses.

Pursuant to 38 U.S.C. § 1780(e), the Veterans Administration (VA) sought recoupment from the veteran, alleging that the sums paid were "over-payments" within the meaning of the statute because the veteran failed the courses. In *United States v. Brandon,* 601 F. Supp. 795 (W.D.N.C. 1985), however, the district court held that under the statute the VA could collect overpayments only where the veteran "fails to enroll or pursue a course" or "provides erroneous information required to be furnished" to the VA.

The court also noted its displeasure over the number of VA recoupment cases clogging its docket. The court noted that more than half the cases filed in its division were VA collection suits in which the government sought to collect amounts usually less than $1,000.

Liability of Joint Account Holders for Overdrafts

Legal assistance officers routinely advise divorcing or separating clients to close any joint checking accounts they have with their spouse. The obvious purpose of that advice is to avoid liability for overdrafts and to protect assets. While this advise is proper, legal assistance officers should be aware that jurisdictions differ on whether one party to a joint account will be liable for overdrafts by the other party. In *Williams v. Cullen Center Bank & Trust,* 685 S.W.2d 311 (Tex. 1985), the Texas Supreme Court determined that one joint tenant on an account would not be responsible to the bank for a $4,242.92 overdraft when that party neither participated in the transaction that created the overdraft nor benefited from it.

The facts indicated that Mary Williams and T.M. Williams were joint signers on a checking account with the bank. Mary Williams, however, never drew any checks against the account nor made any withdrawals. The account was overdrawn in the amount of $4,242.92, bu the manner in which it became overdrawn was not established. The bank sued both Mary and T.M. Williams and obtained a joint and several judgement against each defendant. Mary Williams appealed the judgement.

In deciding the case, the court noted that while there was support in some jurisdictions for establishing liability against Mary Williams, most jurisdictions have implied that the promise to repay an overdraft is imposed only on the

drawer and not on all members of an overdrawn joint account. Such a rule is equitable because a bank is free to reverse this general rule by including explicit language in the agreement which imposes liability for overdrafts on all members of the account. The court, however, suggested, that such an agreement would have to be established by more than the fine print of the contract. A rule to the contrary would expose the joint account holders to unlimited liability. The court concluded that since Mary Williams neither participated in the overdraft, nor received the proceeds or otherwise ratified the overdraft, absent an explicit agreement with the bank to the contrary, she could not be held liable for it.

TAX NEWS

New Mexico Property Tax Exemption

More New Mexico residents who are Vietnam veterans may now be eligible for a $2000 exemption from property tax, thanks to a recent Supreme Court ruling. New Mexico provided an exemption from the state's property tax of $2000 for veterans who had served on active duty during the Vietnam war if the veteran was a New Mexico resident prior to 8 May 1976. Veterans establishing residency in New Mexico after that date were not eligible for the exemption though they had served during the Vietnam war. This statutory scheme was challenged as violating the equal protection clause. The Supreme Court determined that the statute created fixed, permanent distinctions between classes of concededly *bona fide* residents based on when they arrived in the state, and thus violated the equal protection clause of the fourteenth amendment. The Court refused to rule on the severability of the unconstitutional aspect of the New Mexico statute, but remanded the case to permit the state court to determine whether the legislature would have enacted the statute without the invalid limitation. *Hooper v. Bernalillo County Assessor,* 53 U.S.L.W. 4827 (U.S. June 1985).

Individual Retirement Account Development

Individuals who have tried to stretch the Individual Retirement Account (IRA) good deal too far have been caught and penalized by the IRS. A recent revenue ruling involved a taxpayer who made a $2,000 contribution to his IRA, the maximum contribution allowed in a year. The IRA was to earn interest at ten per cent, which was the current market rate. The financial institution offered to increase the interest paid on the IRA account to eighteen percent annually if the taxpayer opened a second, companion account at the bank which was not an IRA account. The taxpayer opened and maintained the second, companion account and received eighteen percent interest on his IRA account. On his tax return for the year, the taxpayer took a $2000 deduction for the IRA contribution and did not recognize as income any of the interest earned on the IRA account.

The IRS was troubled by this scheme. While interest earned on an IRA account is not taxed until distributed, interest from other sources generally is taxed in the year it is earned. The IRS ruled that the interest in excess of the amount that would have been earned by the IRA alone was interest earned by his companion account and that this interest was merely credited to his IRA account. In effect, the IRS treated the income from the companion account as received by the taxpayer, included in his income, and then contributed to his IRA.

The result of this decision was that the interest earned by the companion account was considered as an excess contribution to the IRA account, because the taxpayer had previously made the maximum permissible contribution of $2000 for that year. Accordingly, a six percent excise tax was levied against the interest on the companion account as an excess contribution. Further, the IRS indicated that if the excess contribution was distributed prior to the taxpayer reaching age 59½, the amount distributed would be subject to a ten percent penalty tax for premature distribution. Rev. Rul. 85–62, 1985–20 I.R.B. 24.

Government Employees in the Republic of Panama

The June 1985 edition of *The Army Lawyer* contained information concerning cases which provided a basis for arguing that military and civilian employees of the Panama Canal Commission are exempt from federal income tax based on provisions of the Panama Canal Treaty of 1977. The cases which provided the basis for that position were under appeal at the time of the article. Those cases were reversed by the U.S. Court of Appeals for the Federal Circuit in *United States v. Coplin,* 761 F.2d 688 (Fed. Cir. 1985). The court took judicial notice of statements of representatives of the Panamanian Foreign Ministry indicating that it was the understanding of the Panamanian Government that the provisions of the treaty were not intended to affect the authority of the United States to tax the income of employees of the Panama Canal Commission. Rather, the language of the Treaty was intended only to preclude the Panamanian Government from taxing the income. Accordingly, the court of appeals reversed the district court's judgement in favor of the taxpayers. Based on this decision, although the express language of the treaty would appear to exempt civilian and military employees of the Panama Canal Commission from U.S. taxation, the weight of authority is that these employees are subject to U.S. taxation.

Form for General Power of Attorney Acceptable in Great Britain

Captain David W. Engel, Medical Claims Judge Advocate at Beaumont Army Medical Center, El Paso, Texas, recently researched and prepared a general power of attorney for a legal assistance client which would be accepted in Great Britain as conforming to requirements of British law. He furnished the following information for use by other legal assistance attorneys who may have clients requesting such powers of attorney:

The document itself is executed in the same fashion as an ordinary power of attorney, i.e., the notary's acknowledgment is attached to the end of the document. The power of attorney must contain the names of two witnesses. The notary's signature must in turn be verified by the particular state's secretary of state (or the state official who has legal authority to grant notarial powers). The verification is to the effect that the person notarizing the document is licensed as a notary in the jurisdiction.

Formerly, the document with the attached secretary of state verification had to be forwarded to the British Consulate responsible for the particular state with a $6.75 fee. The British Consulate then verified the authority of the secretary of state. This requirement has now been eliminated, according to the British Consulate in Houston, Texas, and the power of attorney will be accepted in Great Britain without the consulate's verification.

Figure 1 (page 49) is a form general power of attorney developed with the assistance of the British Consulate in Houston for use by legal assistance attorneys.

NOTE: Section 10, (British) Power of Attorney Act of 1971, provides as follows:

(1) Subject to subsection (2) of this section, a general power of attorney in the form set out in Schedule 1 to this Act, or in a form to the like effect, but expressed to be made under this Act, shall operate to confer:

(a) on the donee of the power; or

(b) if there is more than (1) donee, on them jointly or acting jointly and severally, as the case may be, "authority to do on behalf of the donor anything which he can lawfully do by an attorney.

(2) This section does not apply to functions which the donor has as a trustee or personal representative or as a tenant for life or statutory owner within the meaning of the Settled Land Act of 1925.

The following is a suggested form to use in obtaining the verification from the secretary of state, though legal assistance officers would be wise to check with a particular state authority as to the form to use: I, _____, the Secretary of State of _____, do hereby certify that _____, by and before whom the foregoing acknowledgment (or proof) was taken, was, at the time of taking the same, a notary public (or other officer) residing (or authorized to act) in said state (territory of district) to take and certify acknowledgments or proofs or deeds of land in said state (territory or district), and further that I am well acquainted with the handwriting of said _____ and that I verily believe that the signature to said certificate of acknowledgment (or proof) is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said state this _____day of _____, 19 __.

For further information, legal assistance attorneys should contact the consular offices at figure 2 (page 50).

New Belgian Law on Nationality

Major Jon K. Johnson, Acting Staff Judge Advocate, Headquarters, NATO/SHAPE Support Group, Belgium, provided the following item concerning recent changes in the Belgian law of nationality:

Belgian law on the nationality of children born to couples of mixed citizenship recently has undergone revision. Previously, Belgian law provided that a child born in Belgium was considered a Belgian citizen only if his father was Belgian. Now, if either the father or the mother of a child born in Belgium is a Belgian citizen, the child is considered to be a Belgian citizen. This law is applicable retroactively to all children who were less than eighteen years old on 1 January 1985.

This change in Belgian law can have profound effects for male children, who, as Belgian citizen, are subject to Belgian military obligations upon reaching draft age. The only way for a male child to avoid military service in Belgium is to renounce his Belgian citizenship after reaching the age of eighteen.

Details as to the documentation and procedures necessary to accomplish a renunciation of Belgian citizenship may be obtained by contacting the Judge Advocate Division, NATO/SHAPE Support Group (80 ASG), APO New York 09088.

Preventive Law: The Speaker's Circuit

MAJ Mark E. Sullivan, presently assigned as Chief (IMA), Legal Assistance Section, Office of the Staff Judge Advocate, XVIII Airborne Corps, Ft. Bragg, NC, is a member of the ABA Standing Committee on Legal Assistance for Military Personnel (LAMP) and is the Director of the Special Committee on Military Personnel of the North Carolina State Bar. He practices primarily in the area of family law with the firm of Sullivan and Pearson P.A., in Raleigh, North Carolina, and contributes frequently to the Legal Assistance Items section. Two prior articles he authored in a preventive law series dealt with the preparation of handouts and fact sheets (May 1984) and the use of articles and features to focus attention on preventive law at a military installation (September 1984). This third article discusses a "speaker's bureau" type approach as an effective program to deliver the preventive law message to the troops.

Introduction

It is an unfortunate fact of life that there are soldiers and dependents who will never pick up a fact sheet or pamphlet in the legal assistance office (even though it might tell them how to prevent the loss of a rental security deposit) or read a consumer protection article in the post newspaper (although it could explain how to avoid buying a "lemon" at the used car lot). These two preventive law strategies require some minimal action or involvement by the soldier.

There will always be a certain residual group of legal assistance clients who do not or cannot take advantage of the first two preventive law approaches. With this in mind, it is wise to add a third component, a comprehensive post-wide program of speeches, lectures, panel discussions and slide presentations, to alert the military client to the importance of practicing preventive law.

Selecting the Subject

The first task of the legal assistance officer is to choose the topic or topics to be used in the presentations. Particular attention should be given to the priorities of the post commander and the SJA, as well as to the common day-to-

day experience of the legal assistance officer with the legal problems most susceptible to preventive law treatment.

Some subjects are perfect for preventive law briefings. Consumer protection, for example, is an area of interest to almost every audience. The wise use of money is important for each soldier and family member. Excessive expenditures, failure to budget, and ignorance of comparison shopping techniques can often leave a soldier with "too much month left at the end of the money." An effective and comprehensive series of regular briefings for soldiers and family members can help educate them in such areas as contracts, comparing the cost of credit and budgeting for basics.

The "incoming briefing" for troops and family members newly assigned to a post is another excellent arena for preventive law presentations. Areas to cover would be motor vehicle registration, legal services available (public defender, legal aid society, lawyer referral service and staff judge advocate), state and local taxes, local housing referral practices, "military clauses" in leases, tips on "schemes and scams" in the locality, and so on. This briefing should paint preventive law in broad strokes and attempt to "flag" as many problem areas as possible for the recent arrival.

Starting the Program

After the subject has been selected, and the audiences or forums identified, it is the legal assistance officer's task to organize the program. Unless the SJA or base commander has already decided to start a series of preventive law presentations on post (in which case the legal assistance officer's job becomes one of implementation), it is best to initiate the program with a staff study, proposal letter or memorandum to the SJA from the chief of legal assistance. Army Regulation 600–14, Preventive Law, indicates that a preventive law program is a function of command. But commanders are often too busy to devote time and personnel to developing such a program. Army Regulation 27–3, Legal Assistance, para. 2–7, recognizes this and encourages legal assistance attorneys to develop a preventive law program. A staff study should outline the problems commonly seen in the legal assistance office, select the ones that could be addressed by preventive law presentations, set out the benefits and advantages (as well as the time required) and give a proposed outline of the course of instruction.

In addition, I recommend the use of documents such as a command letter, installation regulation or post directive stating the purpose and goals of the program, the content of the presentations, and the requirements for soldiers and commanders. Obviously such course of instruction could be mandatory or optional, but a much greater audience will be reached with a required course of instruction for all battalion-sized units on post.

If the program is mandatory, the point-of-contact for scheduling briefings should be listed, along with the length of time necessary for the instruction and the location to be used (post theatre, gymnasium, NCO club ballroom, *etc.*).

The Ten Commandments

An officer assigned to make a preventive law presentation to a military audience should arrive early, be in proper uniform, know the subject matter thoroughly, keep the speech lively and interesting, and take questions from the audience. In addition to these obvious observations, here is a decalogue for the dedicated speaker:

1. *Use an outline.* Outlines are easier to follow and allow greater flexibility than prepared speeches. A good preventive law presentation will be flexible and informal enough to let the speaker linger on a point, expand on a question from the audience or jump ahead in the sequence of instruction if the occasion demands it. Even excellent presentations can put some soldiers in the audience to sleep. A speaker reading the text of a prepared speech risks putting *all* the audience asleep.

2. *Spotlight salient subheadings.* It is important to write down (even in abbreviated form) a phrase, sentence or word as a reminder for each topic, example or point to be covered within the outline. These are too easy to forget after the presentation has begun and the questions start coming from the audience.

3. *Use short, declaratory sentences.* This is the best means of addressing the audience, making a point and keeping their attention. Long, complex sentences, are often redundant and tend to lose the reader and tire the audience.

4. *Know your audience.* A consumer protection speech before an infantry battalion should be vastly different in speaking style, vocabulary, and approach than a program on wills and estate planning for an officers' wives club. Make sure your illustrations, choice of words and other aspects of the presentation are appropriate for the size, educational level and background of your audience.

5. *Slogans sell.* Whenever possible, use a memorable motto or catchy phrase to reinforce your message. In an estate planning class, a slide or handout with, "Where There's a Will, There's a Way," should help to emphasize the importance of a valid Last Will and Testament. For a class on claims, "Lock It or Lose It" might make the point. Slogans and sayings that employ alliteration or rely on rhymes and repetition will hold the attention of the audience and be remembered.

6. *Use visual aids.* Studies have been conducted over a number of years on the value of visual *and* oral presentations. Some have been done for lawyers on methods of persuading a jury. Others involve salespeople persuading their customers. In each case, the study shows a substantial increase in memory retention for combined audio-visual approaches over the purely oal or entirely visual presentation. Your audience remembers your message better if you both say it and display it. "Show-and-Tell" is still in style.

7. *Know your limits.* A long speech, however profusely illustrated and interspersed with witticisms, will bore the audience at some point. Concentrate on a limited number of main points or lessons, develop them with slides, slogans or examples, and then finish the speech. If a large number of points must be made, use several presentations on different

dates or prepare handouts for the audience on the many points to remember and just hit the highlights during your speech. In addition to KISS ("Keep It Short and Sweet"), also remember LSMFT ("Long Speeches Mean Fatigue and Tedium").

8. *Keep an eye on organization.* High points should be made first or last in the speech, as these are the times when the audience will be most alert. Studies have shown that people's memories are sharpest at the start or end of a sequence and best impressions are made on the listener by the beginning or ending speaker in a series. Details and suggestions which are lumped together in the middle of a speech are most likely to be forgotten.

9. *Vary your style of presentation.* Occasionally forego the lectern-and-microphone standard speech. Try taking questions or reactions from the audience in the middle of the presentation. Put together a skit using audience members or members of the speakers' panel. Develop a panel discussion format or try co-teaching the class with the company or battalion commander.

10. *Preview and review your lessons for the audience.* A good speaker will orient and acquaint the audience with the subject, make the presentation itself and then summarize the major points of discussion. The best format for an informational speech has always been: "Tell them what you're going to tell them; tell them; then tell them what you've told them."

The point is, you do not have to be a great orator to give a good preventive law presentation. A speaker who does some practicing in advance and who understands the rules of effective speaking will have no trouble in delivering the message to an audience.

A Sample Speech Outline

As mentioned above, one familiar theme for preventive law briefings is "consumer protection." One possible consumer education outline is as follows:

Title: "When Money Talks, Nobody Walks"

I. Consumer Protection Presentation.

A. Speaker: CPT _____.

B. Time and Place: 30 minutes, _____ Gymnasium, Ft. _____.

C. Topic: "Consumer Schemes and Scams."

D. Program of instruction.

1. Introduction.

2. Current consumer fraud schemes in _____*(state)*_____.

a. Real estate: interstate land sales; "timesharing" contracts.

b. Overpriced "bargains": encyclopedias, vacuum cleaners, freezer meat, photo development, magazine subscriptions.

c. Use of "As Is" or "With All Faults" in contracts.

d. Repossession and deficiency judgments.

e. "Bait-and-switch" tactics.

f. Ask for other examples from audience.

3. Slogans to spotlight.

a. "Think Before You Ink"—examples of unwise or unnecessary purchases.

b. "Read, Don't Stampede"—importance of reading the lease or contract.

c. "If It's Written, You Won't Get Bitten"—oral promises are worthless . . . write them down on the agreement and have the other party sign or initial them.

d. "Buyer Beware, Better Compare"—shop around for price and quality; example of N.A.D.A. (National Automobile Dealers' Association) "*Blue Book*" for buying used cars.

e. "Avoid That Snag, See a JAG"—visit your local JAG officer *before* you sign the contract.

4. Using common sense: the example approach.

a. How to read a contract (look for specifications; description of property and extras; read "Default" and "Conditions of Payment" clauses; pay attention to APR (Annual Percentage Rate) and finance charge; avoid "As Is" on contracts; write in any oral promises and have seller sign).

b. How to read a warranty (who pays for what; limited warranties; special conditions; implied warranties and waiver).

c. How to buy a used car (N.A.D.A. *Blue Book;* independent mechanic; limit the downpayment; avoid "AS IS;" read contract and warranty; shop around; do not rely on oral promises).

d. How to buy a mobile home (similar to 4.c. above; trouble spots to investigate closely in the home's construction).

e. How to deal with door-to-door salesmen (the "foot-in-the-door' approach; avoid the "buy today" pitch; watch out for overpriced merchandise; comparison shopping; know cancellation rights).

f. How to rent quarters (importance of a "military clause" and a written lease; holdover tenacies; required notice for evictions when no written lease; damages-and-checklists; Small repairs;

Claims Court and the unreturned deposit; duties of the military tenant).

5. Awareness of the law—state law.

   a. Cancellation rights in home solicitation sales (3- and 30-day rights).

   b. How to collect attorney's fees if you win in court.

   c. Claim for additional damages under state law (if applicable).

   d. Referral sales; balloon payments; discrimination against women in credit sales.

   e. Retaliatory eviction as a developing area of the law.

   f. Holder-in-due-course (HDC) doctrine.

6. Awareness of the law—federal law.

   a. FTC rule on home solicitation sales (3-day cancellation).

   b. Consumer Credit Protection Act.

   i. Truth-in-Lending Act (show contract to audience; discuss terms, APR, finance charge, comparison shopping).

   ii. Fair Credit Reporting Act.

   iii. Unauthorized purchases on lost credit cards (use audience questions and examples; remind audience to record numbers of all credit cards).

7. Remedy awareness—"Who can help me?"

   a. Small claims court.

   b. Legal assistance officers—counseling and negotiations.

   c. Private attorney.

   d. Armed Forces Disciplinary Control Board.

   e. Attorney General's Office.

   f. Off-Post Housing Referral Office.

   g. Human Relations Office.

   h. District Attorney for criminal case (i.e., fraud; larceny by trick; intentional and wrongful withholding of rent by rental agent).

   i. State agencies and licensing boards.

   j. Federal Trade Commission.

   k. Housing and Urban Development Department (interstate land sales).

   l. U.S. Postal Service (mail fraud).

   m. Better Business Bureau/Chamber of Commerce.

8. Conclusion.

9. Questions from the audience.

II. Finance Presentation (by officer or NCO from post finance office, detailing how to read a Leave-and-Earnings Statement, how to initiate or terminate allotments, soldiers' rights and responsibilities regarding family support and involuntary allotments, *etc.*).

III. Debt Management Presentation (by post debt counselor, member of Army Community Service Office or individual from local debt counseling service, indicating how to control excessive expenditures, advantages and problems of "easy credit," how to set up a budget, when to buy "on time" or with cash, when to "cut up the credit cards" or consider bankruptcy, *etc.*).

Conclusion

An effective preventive law program can easily be organized and established at any post. A selection of interesting and informative speeches and presentations will "bring the message home" to the audience. Such a program is an invaluable aid to the legal assistance officer in minimizing legal problems of the soldier or dependent, if not in avoiding such legal difficulties altogether. The program is also a substantial asset to the command in protecting soldiers on the post. All that is needed is the time, efforts and dedication of the SJA and the legal assistance office.

"LAMP" Committee News

The American Bar Association (ABA) has announced that Clayton B. Burton of Clearwater, Florida, has been reappointed for a second term as chairman of the ABA's Standing Committee on Legal Assistance for Military Personnel. Burton is a private practitioner and a Colonel in the Air Force Judge Advocate General's Corps, (USAFR).

The ABA's Standing Committee On Legal Assistance For Military Personnel, know as the LAMP Committee, provides support to the Legal Assistance programs of the uniformed services.

Additionally, the Military Law Committee of the ABA Section of General Practice is distributing a speaker's packet which contains information concerning programs undertaken by the ABA and various state bar associations for military attorneys. The information packet contains a script, tape, and color slides which describe these programs. A similar speaker's packet was previously distributed by the LAMP Committee.

Closing of Army Family Communications Line

Legal assistance attorneys should annotate their office copies of the Legal Assistance Officer's Deskbook and Formbook at Appendix H-1, Chapter 1, to indicate that the Army Family Communications Line has been put out of service. Appendix H-1 is a fact sheet on this line. The

appendix lists three toll-free numbers which, until 28 June 1985, could be called to obtain information about Army family programs.

The communications line was established four years ago to provide soldiers and their family members the opportunity to air problems and complaints and to cut through red tape on personal, financial, and job-related problems. The line has been discontinued because CHAMPUS, DEERS, the National Guard, the Army Reserve and other agencies and commands now offer telephone services to provide information to those with family-type problems. In addition, the new Army Community and Family Support Center maintains the Personnel Assistance Branch in Alexandria, VA, which handles nonsupport problems. This subject generated more telephone calls on the family telephone line than any other family issue.

The Personnel Assistance Branch is prepared to deal with nonsupport problems if they cannot be resolved at the local installation level. Before contacting the Branch, legal assistance attorneys are encouraged to contact the nonsupporter's immediate commander. If the problem cannot be resolved, legal assistance attorneys should write to: DAUSACFSC, ATTN: DACF–IS–PA, 2461 Eisenhower Avenue, Alexandria, VA 22311–0522. The letter must include the full name and social security number of the service member and a description of the problem. Include copies of any documents such as divorce decrees, birth certificates, copies of previous correspondence and a daytime telephone number where the complainant or legal assistance attorney may be reached.

For family problems other than nonsupport or paternity, legal assistance attorneys may contact the local Army Community Service office, and if the problem cannot be resolved through that office, the following address may be contacted: HQDA(DAPE–ZAF), Family Liaison Office, Washington, D.C. 20310–0300.

Formbook/Deskbook Placed With Defense Technical Information Center

The Legal Assistance Branch, Administrative & Civil Law Division, TJAGSA, continues to receive requests from the field for additional copies of the Legal Assistance Officer's Deskbook and Formbook, which was distributed worldwide in April and May 1985. Constraints on the TJAGSA budget preclude printing more than one copy for each legal assistance office worldwide. The two-volume publication, however, has been placed with the Defense Technical Information Center (DTIC), Cameron Station, VA, and may be ordered by offices which have an account with DTIC.

Information on how to establish an account with DTIC, and information on ordering through DTIC were detailed in the August 1985 edition of *The Army Lawyer*. Available publications are listed in the "Current Materials of Interest" section of this issue. For legal assistance offices desiring to purchase the Deskbook/Formbook, the numbers by which the publication may be ordered are:

Volume I—AD–B090–988
Volume II—AD–B090–989

Suggestions for Proposed Revision of Army Regulation 27–3

It has been approximately eighteen months since Army Regulation 27–3, Legal Assistance, took effect and experience under the regulation has led to several proposed changes from the field to improve or clarify certain provisions.

Legal assistance attorneys are invited to send comments on their experience under the regulation and their suggestions for improvements or changes to the regulation to Colonel Richard S. Arkow, Chief, Legal Assistance Office, Office of The Judge Advocate General, ATTN: DAJA–LA Washington, D.C. 20310–2215.

This General Power of Attorney is made this _____ day of _____ 19___ by _____ (name of grantor), of _____. I appoint _____ (name of grantee) to be my attorney with all of the powers set forth in Section 10 of the Powers of Attorney Act of 1971.

In witness whereof I here unto set my hand and seal the day, month and year above written and here unto signed, sealed and delivered by me, the said _____ (name of grantor) in the presence of

_____
(Witness No. 1—name, address and occupation)

_____
(Witness No. 2—name, address and occupation)

_____
(signature of grantor)

_____
(signature of Witness No. 1)

_____
(signature of Witness No. 2)

State of _____

County of _____

Before me, a Notary Public, on this day personally appeared _____, known to me as the person whose name is subscribed to the foregoing instrument and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this _____ day of _____, 19____.

_____
Notary Public, State of _____

My commission expires the _____ day of _____, 19____.

(The form printed above is in a form equivalent to the form at Schedule 1 of the British Power of Attorney Act).

Figure 1. Sample Power of Attorney

City	Address	Area Served	
Atlanta, GA	British Consulate General Suite 912 225 Peachtree Street NE Atlanta, Georgia 30303 (Tel: (404)524–5856)	Alabama Florida Georgia Mississippi	North Carolina South Carolina Tennessee
Chicago, IL	British Consulate General 33 North Dearborn Street Chicago, Illinois 60602 (Tel: (312) 346–1810)	Illinois Indiana Iowa Kansas Kentucky Ohio Michigan Minnesota Wisconsin	Missouri Nebraska North Dakota Pennsylvania West of Alleghenies Alleghenies West Virginia South Dakota
Houston, TX	British Consulate General Suite 2250 601 Jefferson Houston, Texas 77002 (Tel: (713) 659–6270)	Arkansas Colorado Louisiana	New Mexico Oklahoma Texas
Los Angeles, CA	British Consulate General 3701 Wilshire Boulevard Los Angeles, CA 90010 (Tel: (213) 385–7381)	Alaska Arizona California Guam Idaho Nevada Montana Wyoming	Oregon Trust Territory of the Pacific Utah Washington
New York, NY	British Consulate General 845 Third Avenue New York, NY 10022 (Tel: (212) 752–8400)	Connecticut Maine Massachusetts New Hampshire New Jersey Virgin Islands Puerto Rico	New York Pennsylvania East of Alleghenies Rhode Island Vermont
Washington, DC	British Embassy Consular Section 3100 Massachusetts Avenue NW Washington, DC 20008	District of Columbia Delaware	Maryland Virginia

Figure 2. British Passport and Visa Offices

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses conducted at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMSs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are non-unit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOM and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 293-6286; commercial phone: (804) 293-6286; FTS: 938-1304).

2. TJAGSA CLE Course Schedule

October 8-11: 1985 Worldwide JAG Conference.

October 15-20 December 1985: 108th Basic Course (5-27-C20).

October 21-25: 4th Advanced Federal Litigation Course (5F-F29).

October 28-1 November 1985: 17th Legal Assistance Course (5F-F23).

November 4-8: 81st Senior Officers Legal Orientation Course (5F-F1).

November 12-15: 21st Fiscal Law Course (5F-F12).

November 18-22: 7th Claims Course (5F-F26).

December 2-13: 1st Advanced Acquisition Course (5F-F17).

December 16-20: 28th Federal Labor Relations Course (5F-F22).

January 13-17: 1986 Government Contract Law Symposium (5F-F11).

January 21-28 March 1986: 109th Basic Course (5-27-C20).

January 27-31: 16th Criminal Trial Advocacy Course (5F-F32).

February 3-7: 32nd Law of War Workshop (5F-F42).

February 10-14: 82nd Senior Officers Legal Orientation Course (5F-F1).

February 24-7 March 1986: 106th Contract Attorneys Course (5F-F10).

March 10-14: 1st Judge Advocate & Military Operations Seminar (5F-F47).

March 10-14: 10th Admin Law for Military Installations (5F-F24).

March 17-21: 2nd Administration & Law for Legal Clerks (512-71D/20/30).

March 24-28: 18th Legal Assistance Course (5F-F23).

April 1-4: JA USAR Workshop.

April 8-10: 6th Contract Attorneys Workshop (5F-F15).

April 14-18: 83d Senior Officers Legal Orientation Course (5F-F1).

April 21-25: 16th Staff Judge Advocate Course (5F-F52).

April 28-9 May 1986: 107th Contract Attorneys Course (5F-F10).

May 5-9: 29th Federal Labor Relations Course (5F-F22).

May 12-15: 22nd Fiscal Law Course (5F-F12).

May 19-6 June 1986: 29th Military Judge Course (5F-F33).

June 2-6: 84th Senior Officers Legal Orientation Course (5F-F1).

June 10-13: Chief Legal Clerk Workshop (512-71D/71E/40/50).

June 16-27: JATT Team Training.

June 16-27: JAOAC (Phase II).

July 7-11: U.S. Army Claims Service Training Seminar.

July 7-11: 15th Law Office Management Course (7A-713A).

July 14-18: Professional Recruiting Training Seminar.

July 14-18: 33d Law of War Workship (5F-F42)

July 21-26 September 1986: 110th Basic Course (5-27-C20).

July 28-8 August 1986: 108th Contract Attorneys Course (5F-F10).

August 4-22 May 1987: 35th Graduate Course (5-27-C22).

August 11-15: 10th Criminal Law New Developments Course (5F-F35).

September 8-12: 85th Senior Officers Legal Orientation Course (5F-F1).

3. Civilian Sponsored CLE Courses

December 1985

1-5: NCDA, Criminal Investigation Course, Orlando, FL.

1-6: NJC, Judicial Administration - Specialty, Reno, NV.

2-4: FPI, Government Contract Costs, Williamsburg, VA.

2-4: GCP, Competitive Negotiation Workshop, Washington, DC.

5-6: PLI, Real Estate Workouts, New York, NY.

6: GICLE, Conflicts, Malpractice & Ethics, Atlanta, GA.

6: GICLE, Secured Lending, Atlanta, GA.

8-13: NJC, Alcohol & Drugs - Specialty, Reno, NV.

9-11: GCP, Patents & Technical Data, San Francisco, CA.

9-13: GICLE, GICLE Video Replays - 2 per day, Atlanta, GA.

12-13: SBT, Environmental Law, Houston, TX.

13: GICLE, Labor Law Institute, Atlanta, GA.

16-18: FPI, Cost Estimating for Government Contracts, Lake Tahoe, NV.

16-20: GCP, Administration of Government Contracts, Honolulu, HI.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the July 1985 issue of *The Army Lawyer.*

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 December annually
Colorado	31 January annually
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Iowa	1 March annually
Kansas	1 July annually
Kentucky	1 July annually
Minnesota	1 March every third anniversary of admission
Mississippi	31 December annually
Montana	1 April annually
Nevada	15 January annually
North Dakota	1 February in three year intervals
South Carolina	10 January annually
Vermont	1 June every other year
Washington	31 January annually
Wisconsin	1 March annually
Wyoming	1 March annually

For addresses and detailed information, see the August 1985 issue of The Army Lawyer.

Current Material of Interest

1. TJAGSA Publications Available Through DTIC

The following TJAGSA publications are available through the Defense Technical Information Center (DTIC): (The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.)

AD NUMBER	TITLE
AD B086941	Criminal Law, Pretrial Procedure, Trial/ JAGS–ADC–84–1 (150 pgs).
AD B086940	Criminal Law, Procedure, Trial/ JAGS–ADC–84–2 (100 pgs).
AD B086939	Criminal Law, Procedure, Posttrial/ JAGS–ADC–84–3 (80 pgs).
AD B086938	Criminal Law, Crimes & Defenses/ JAGS–ADC–84–4 (180 pgs).
AD B086937	Criminal Law, Evidence/ JAGS–ADC–84–5 (90 pgs).
AD B086936	Criminal Law, Constitutional Evidence/ JAGS–ADC–84–6 (200 pgs).
AD B086935	Criminal Law, Index/JAGS–ADC–84–7 (75 pgs).
AD B090375	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–85–1 (200 pgs).
AD B090376	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–85–2 (175 pgs).
AD B078095	Fiscal Law Deskbook/JAGS–ADK83–1 (230 pgs).
AD B079015	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–84–1 (266 pgs).
AD B077739	All States Consumer Law Guide/ JAGS–ADA–83–1 (379 pgs).
AD B089093	LAO Federal Income Tax Supplement/ JAGS–ADA–85–1 (129 pgs).
AD B077738	All States Will Guide/JAGS–ADA–83–2 (202 pgs).
AD B080900	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All-States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B087847	Claims Programmed Text/ JAGS–ADA–84–4 (119 pgs).
AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–84–6 (39 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–84–7 (76 pgs).
AD B087774	Government Information Practices/ JAGS–ADA–84–8 (301 pgs).
AD B087746	Law of Military Installations/ JAGS–ADA–84–9 (268 pgs).
AD B087850	Defensive Federal Litigation/ JAGS–ADA–84–10 (252 pgs).
AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations JAGS–ADA–84–12 (321 pgs).
AD B087745	Reports of Survey and Line of Duty Determination/JAGS–ADA–84–13 (78 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook, JAGS–ADA–85–5 (315 pgs).
AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (approx. 75 pgs).

Those ordering publications are reminded that they are for government use only.

2. Regulations & Pamphlets

Number	Title	Change	Date
AR 135–18	Active Guard/Reserve (AGR) Program		15 Jul 85

AR 210–7	Commercial Solicitation on Army Installations	I02	15 Dec 78
AR 608–1	Army Community Service Program		8 Jul 85
AR 635–40	Physical Evaluation for Retention, Retirement, or Separation	I06	15 Feb 80
UPDATE 5	Enlisted Ranks Personnel UPDATE Handbook		15 Jul 85

3. Articles

Cassell, *Restrictions on Press Coverage of Military Operations: The Right of Access, Grenada, and "Off-the-Record Wars,"* 73 Geo. L. J. 931 (1985).

DiSciullo, *Grace Commission's Proposals for Federal Real Property Management,* 8 Seton Hall Legis. J. 307 (1984–85).

Driscoll, *The Illegality of Bribery: Its Roots, Essence, and Universality,* 14 Cap. U. L. Rev. 1 (1984).

Horning, *Electronically Stored Evidence,* 41 Wash. & Lee L. Rev. 1335 (1984).

Johnson, Johnson & Little, *Expertise in Trial Advocacy: Some Considerations for Inquiry into its Nature and Development,* 7 Campbell L. Rev. 119 (1984).

McGraw, Farthing-Capowich & Keilitz, *The "The Guilty but Mentally Ill" Plea and Verdict: Current State of the Knowledge,* 30 Vill. L. Rev. 117 (1985).

Note, *Municipal Liability for Negligent Enforcement of Driving While Intoxicated Statutes: Massachusetts Leads the Way in* Irwin v. Town of Ware, 7 W. New Eng. L. Rev. 239 (1984).

Note, *The Testimony of Child Victims in Sex Abuse Prosecutions: Two Legislative Innovations,* 98 Harv. L. Rev. 806 (1985).

*U.S. GOVERNMENT PRINTING OFFICE: 1985-461-027:20381

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